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Contents

Federal Register

Vol. 74, No. 234

Tuesday, December 8, 2009

Separate Parts In This Issue

Reader Aids
Consult the Reader Aids section at the end of this page for phone numbers, online resources, finding aids, reminders, and notice of recently enacted public laws.

To subscribe to the Federal Register Table of Contents LISTSERV electronic mailing list, go to http://listserv.access.gpo.gov and select Online mailing list archives, FEDREGTOC-L, Join or leave the list (or change settings); then follow the instructions.

CFR PARTS AFFECTED IN THIS ISSUE

A cumulative list of the parts affected this month can be found in the Reader Aids section at the end of this issue.

3 CFR

Proclamations:

8460.....64585
8461.....64587
8462.....64589

7 CFR

1465.....64591

18 CFR

40.....64884

19 CFR

101.....64601

27 CFR

9.....64602

33 CFR

117.....64613
165.....64613

Proposed Rules:

117.....64641

40 CFR

300.....64615

Proposed Rules:

50.....64810
53.....64810
58.....64810
261.....64643
300.....64658

48 CFR

802.....64619
804.....64619
808.....64619
809.....64619
810.....64619
813.....64619
815.....64619
817.....64619
819.....64619
828.....64619
852.....64619

50 CFR

21.....64638

Proposed Rules:

17.....64930

Federal Register
Vol. 74, No. 234
Tuesday, December 8, 2009

Presidential Documents

Title 3—

The President

Proclamation 8460 of December 2, 2009

Critical Infrastructure Protection Month, 2009

By the President of the United States of America

A Proclamation

Critical infrastructure protection is an essential element of a resilient and secure nation. Critical infrastructure are the assets, systems, and networks, whether physical or virtual, so vital to the United States that their incapacitation or destruction would have a debilitating effect on security, national economic security, public health or safety. From water systems to computer networks, power grids to cellular phone towers, risks to critical infrastructure can result from a complex combination of threats and hazards, including terrorist attacks, accidents, and natural disasters. During Critical Infrastructure Protection Month, we pledge to work together to shelter our communities from the harm of uncertain threats.

My Administration is committed to ensuring our country's essential resources are safe and capable of recovering from disruptive incidents. The Department of Homeland Security is leading a coordinated national program to reduce risks and improve our national preparedness, timely response, and rapid recovery in the event of an attack, natural disaster, or other emergency. The Department, in collaboration with other Federal stakeholders, State, local, and tribal governments, and private sector partners, has developed the National Infrastructure Protection Plan (NIPP) to establish a framework for securing our resources and maintaining their resilience from all hazards during an event or emergency.

During Critical Infrastructure Protection Month, we rededicate ourselves to safeguarding and strengthening our Nation's infrastructure. Additionally, members of the public and private sectors should work with their appropriate State, regional, and local authorities to engage in critical infrastructure protection activities being coordinated across the country. Americans can learn more about the NIPP and its partnership framework by visiting: www.dhs.gov/criticalinfrastructure.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim December 2009 as Critical Infrastructure Protection Month. I call upon the people of the United States to recognize the importance of partnering to protect our Nation's resources and to observe this month with appropriate events and training to enhance our national security and resilience.

IN WITNESS WHEREOF, I have hereunto set my hand this second day of December, in the year of our Lord two thousand nine, and of the Independence of the United States of America the two hundred and thirty-fourth.

[FR Doc. E9–29371
Filed 12–7–09; 8:45 am]
Billing code 3195–W0–P

Presidential Documents

Proclamation 8461 of December 2, 2009

National Impaired Driving Prevention Month, 2009

By the President of the United States of America

A Proclamation

Every day, people put themselves and their fellow Americans in danger on our Nation's roadways when they drive after consuming alcohol or after using legal and illegal drugs. During this holiday season, we must all be especially vigilant in protecting our families, friends, and neighbors from drivers who are under the influence of drugs or alcohol.

Although we have succeeded in decreasing the number of drunk drivers in recent years, we have seen a disturbing increase in Americans driving under the influence of drugs.

Operating a vehicle under the influence of drugs poses the same risks as drunk driving, and we must do more to stop this growing epidemic. Families, businesses, community organizations, and faith-based groups can promote substance abuse prevention as well as alternative sources of transportation for those under the influence of drugs or alcohol. Each of us can save lives in our own communities by encouraging our fellow citizens to drive responsibly.

My Administration is working hard to prevent impaired driving. The Department of Transportation's National Highway Traffic Safety Administration is again sponsoring the campaign known as ''Drunk Driving. Over the Limit. Under Arrest.'' This effort involves thousands of law enforcement agencies across America. Police will expand their efforts during the high-risk travel period between December 16, 2009, and January 3, 2010 to ensure that impaired drivers are stopped and arrested.

During National Impaired Driving Prevention Month, we are reminded of the importance of driving free from the influence of alcohol and drugs, and we renew our commitment to preventing the senseless loss of life that too often results from this irresponsible behavior. By working together, we can make our Nation's roadways safer for all Americans.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim December 2009 as National Impaired Driving Prevention Month. I urge all Americans to make responsible decisions and take appropriate measures to prevent impaired driving.

IN WITNESS WHEREOF, I have hereunto set my hand this second day of December, in the year of our Lord two thousand nine, and of the Independence of the United States of America the two hundred and thirty-fourth.

[FR Doc. E9–29372
Filed 12–7–09; 8:45 am]
Billing code 3195–W0–P

Presidential Documents

Proclamation 8462 of December 2, 2009

International Day of Persons with Disabilities, 2009

By the President of the United States of America

A Proclamation

This year, in an effort to renew our global commitment to human rights and fundamental freedoms for persons with disabilities, the United States became a proud signatory of the United Nations Convention on the Rights of Persons with Disabilities. This treaty represents a paradigm shift, urging equal protection and benefits for all citizens, and reaffirming the inherent dignity and independence of the 650 million people living with disabilities worldwide. Today, as we commemorate the International Day of Persons with Disabilities, we celebrate the skills, achievements, and contributions of persons with disabilities in America and around the world. We recognize the progress we have made toward equality for all, and we rededicate ourselves to ensuring individuals with disabilities can reach their greatest potential.

Despite our increased efforts, persons with disabilities continue to face barriers to their full participation in society. In the United States, Americans with disabilities still experience discrimination in the workplace and in their communities. In developing nations, 90 percent of children with disabilities do not attend school, and women and girls with disabilities are all too often subjected to deep discrimination. If we are to move forward as a people, both at home and abroad, all individuals must be fully integrated into our human family.

The International Day of Persons with Disabilities is a time to renew our commitment to the principles of empowerment, dignity, and equality. The United States has co-sponsored and joined consensus on the United Nations General Assembly Third Committee's resolution titled, ''Realizing the Millennium Development Goals for Persons with Disabilities.'' We must continue to embrace diversity and reject discrimination in all its forms, and insist on equality of opportunity and accessibility for all. Let our efforts remind us that when we work together, we can build a world free of unnecessary barriers and include every member of our international community.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim December 3, 2009, as International Day of Persons with Disabilities. I call on all Americans to observe this day with appropriate ceremonies, activities, and programs.

IN WITNESS WHEREOF, I have hereunto set my hand this second day of December, in the year of our Lord two thousand nine, and of the Independence of the United States of America the two hundred and thirty-fourth.

[FR Doc. E9–29373
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Rules and Regulations

Federal Register
Vol. 74, No. 234
Tuesday, December 8, 2009

DEPARTMENT OF AGRICULTURE

Commodity Credit Corporation

7 CFR Part 1465

RIN 0578–AA50

Agricultural Management Assistance Program

AGENCY: Commodity Credit Corporation, Natural Resources Conservation Service, United States Department of Agriculture

ACTION: Final rule.

SUMMARY: This final rule sets forth the policies and procedures implementing the Agricultural Management Assistance Program (AMA). The Natural Resources Conservation Service (NRCS), on behalf of the Commodity Credit Corporation (CCC), published an interim final rule with request for comment on November 20, 2008 (73 FR 70245). NRCS issues this final rule to address public comments received during the 60-day public comment period and to clarify policies to improve program implementation.

DATES: *Effective Date:* The rule is effective December 8, 2009.

ADDRESSES: This final rule may be accessed via the Internet at: *http://www.nrcs.usda.gov/programs/farmbill/2008/index.html,* or the government-wide rulemaking Web site: at *http://www.regulations.gov,* (identified by Docket Number NRCS–FR–09050).

Persons with disabilities who require alternative means for communication (Braille, large print, audio tape, etc.) should contact the USDA TARGET Center at: (202) 720–2600 (voice and TDD).

FOR FURTHER INFORMATION CONTACT: Gregory Johnson, Director, Financial Assistance Programs Division, Natural Resources Conservation Service, 1400 Independence Avenue, SW., Room 5241 South Building, Washington, DC 20250; Telephone: (202) 720–1844; Fax: (202) 720–4265.

SUPPLEMENTARY INFORMATION:

Regulatory Certifications

Executive Order 12866

The Office of Management and Budget has determined that this final rule is a non-significant regulatory action under Executive Order 12866.

Regulatory Flexibility Act

NRCS has determined that the Regulatory Flexibility Act is not applicable to this final rule because NRCS is not required by 5 U.S.C. 553, or any other provision of law, to publish a notice of proposed rulemaking with respect to the subject matter of this rule.

Executive Order 13132

This final rule has been reviewed in accordance with the requirements of Executive Order 13132, Federalism. The Department of Agriculture (USDA) has determined that this final rule conforms with the Federalism principles set forth in the Executive Order; would not impose any compliance costs on the States; and would not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities on the various levels of government. Therefore, USDA concludes that this final rule does not have Federalism implications.

Executive Order 13175

This final rule has been reviewed in accordance with Executive Order 13175, Consultation and Coordination with Indian tribal governments. NRCS has assessed the impact of this final rule on Indian tribal governments and has concluded that this rule will not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Environmental Analysis

The National Environmental Policy Act (NEPA) applies to ''major Federal actions'' where the agency has control and responsibility over the actions and has discretion as to how the actions will be carried out (40 CFR part 1508.18). Accordingly, any actions that are directed by Congress to be implemented in such manner that there is no discretion on the part of the agency are not required to undergo an environmental review under NEPA. The lack of discretion over the action by the agency undermines the rationale for NEPA review—evaluation of the environmental impacts of the proposed action and consideration of alternative actions to avoid or mitigate the impacts. Where Congress has directed that a specific action be implemented, and an agency has no discretion to consider and take alternative actions, a NEPA review would be moot.

For AMA, the interim final rule noted that Congress mandated the addition of Hawaii to the list of States to which the Secretary of Agriculture is authorized to provide financial assistance. The Secretary is, therefore, required to make this addition to the program. There is no discretion on the part of the agency to take this action. For this reason, an environmental review of these changes under NEPA was not required nor prepared for the interim final rule.

For this final rulemaking, NRCS has determined there are a few minor discretionary changes that should be made. The majority of these changes are administrative, technical, or corrections to the regulation. The primary change is the expansion of the definition of eligible lands to include those lands that are publicly owned. The agency believes that any potential effects from this minor change to the human environment have been sufficiently analyzed in the Programmatic Environmental Assessment (EA) and Finding of No Significant Impact issued for AMA on March 23, 2003, which included public lands in the definition of eligible lands. As a result, a new Programmatic EA is not warranted.

Civil Rights Impact Analysis

NRCS has determined through a Civil Rights Impact Analysis that the issuance of this final rule discloses no disproportionately adverse impact for minorities, women, or persons with disabilities. The data presented indicates producers who are members of the historically underserved groups have participated in NRCS programs at parity with other producers. Extrapolating from historical participation data, it is reasonable to conclude that NRCS programs,

including AMA, will continue to be administered in a non-discriminatory manner. Outreach and communication strategies are in place to ensure all producers will be provided the same information to allow them to make informed compliance decisions regarding the use of their lands that will affect their participation in USDA programs. AMA applies to all persons equally regardless of race, color, national origin, gender, sex, or disability status. Therefore, the AMA rule portends no adverse civil rights implications. Copies of the Civil Rights Impact Analysis may be obtained from Gregory Johnson, Director, Financial Assistance Programs Division, Department of Agriculture, Natural Resources Conservation Service, 1400 Independence Avenue, SW., Room 5241 South Building, Washington, DC 20250.

Paperwork Reduction Act

Section 2904 of the Food, Conservation, and Energy Act of 2008 (2008 Act) requires that implementation of programs authorized by Title II of the 2008 Act be made without regard to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). Therefore, NRCS is not reporting recordkeeping or estimated paperwork burden associated with this final rule.

Government Paperwork Elimination Act

NRCS is committed to compliance with the Government Paperwork Elimination Act, which requires Government agencies, in general, to provide the public the option of submitting information or transacting business electronically to the maximum extent possible. To better accommodate public access, NRCS has developed an online application and information system for public use.

Executive Order 12988

This final rule has been reviewed in accordance with Executive Order 12988, Civil Justice Reform. The provisions of this final rule are not retroactive. Furthermore, the provisions of this final rule preempt State and local laws to the extent such laws are inconsistent with this final rule. Before an action may be brought in a Federal court of competent jurisdiction, the administrative appeal rights afforded persons at 7 CFR parts 11 and 614 must be exhausted.

Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994

USDA classified this final rule as ''not major'' under section 304 of the Department of Agriculture Reorganization Act of 1994, Public Law 104–354. Therefore, a risk assessment is not required.

Unfunded Mandates Reform Act of 1995

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995, Public Law 104–4, NRCS assessed the effects of this rulemaking action on State, local, and Tribal governments, as well as the public. This action does not compel the expenditure of $100 million or more by any State, local, or Tribal governments, or anyone in the private sector, therefore, a statement under section 202 of the Unfunded Mandates Reform Act of 1995 is not required.

Discussion of Program

The conservation provisions of AMA are administered and implemented under the general supervision and direction of the Chief of NRCS, who is a Vice President of the Commodity Credit Corporation (CCC). Accordingly, where NRCS is mentioned in this rule, it also refers to the CCC's funds, facilities, and authorities, where applicable. While NRCS has leadership for the conservation provisions of AMA, other agencies have authority for different aspects of the program. The Agricultural Marketing Service has responsibility for the organic certification cost-share program and the Risk Management Agency has responsibility for the insurance cost-share program for mitigation of financial risk.

Through AMA, NRCS provides technical and financial assistance to participants in eligible States to address issues such as water management, water quality, and erosion control by incorporating conservation practices into their agricultural operations. Producers may construct or improve water management structures or irrigation structures; plant trees for windbreaks or to improve water quality; and mitigate risk through production diversification or resource conservation practices, including soil erosion control, integrated pest management, or organic farming.

Section 524(b) of the Federal Crop Insurance Act, as amended by section 133 of the Agricultural Risk Protection Act of 2000, authorized AMA to provide assistance to producers in States that historically had low participation in the Federal Crop Insurance Program. The Farm Security and Rural Investment Act of 2002 made amendments to AMA specifying eligible States and providing additional clarity on the types of assistance to be made available. The original AMA regulation (7 CFR part 1465) was published in the **Federal Register** on April 9, 2003.

Section 2801 of the 2008 Act amended AMA to include Hawaii as an eligible State, and to authorize $15 million in funding each year from fiscal year (FY) 2008 through FY 2012. In response to these statutory changes, NRCS published an interim final rule with request for comment on November 20, 2008 (73 FR 70245). NRCS received four letters containing approximately one dozen comments. Respondents included two non-governmental organizations, one individual, and one Tribal agency. Comments were received from Arizona, Nebraska, Pennsylvania, and Wyoming. The discussion that follows is organized in the same sequence as the final rule.

Discussion of Comments

Section 1465.1 Purposes and Applicability

Section 1465.1, ''Purposes and Applicability,'' sets forth AMA's purpose, scope, and objectives. Through AMA, NRCS provides technical and financial assistance to producers in statutorily-designated States. Section 2801 of the 2008 Act expanded AMA's geographic scope to include the State of Hawaii. In response, NRCS revised § 1465.1 in the interim final rule to add Hawaii to the list of States eligible for AMA assistance and replaced ''15'' with the number ''16'' when referring to the number of eligible States. AMA is now available in Connecticut, Delaware, Hawaii, Maine, Maryland, Massachusetts, Nevada, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Utah, Vermont, West Virginia, and Wyoming. One respondent indicated his overall support of the AMA program, stating that AMA provides ''the best source of financial support that {the} government has developed to assure continued stewardship of America's natural resources.'' No changes have been made in this section.

Section 1465.2 Administration

Section 1465.2, ''Administration,'' describes the role of NRCS and provides a brief overview of the agency's administrative responsibilities. In the interim final rule NRCS amended § 1465.2 to reflect the 2003 decision made by USDA to have NRCS administer the AMA natural resource conservation provisions and to clarify NRCS' relationship with the CCC. No further changes have been made in this section.

Section 1465.3 Definitions

Section 1465.3 sets forth definitions for terms used throughout this

regulation. The interim final rule added or revised several definitions to align AMA terms with terms used by other NRCS conservation programs. Two respondents commented on the definitions provided in § 1465.3.

One respondent requested that the ''resource concern'' definition reflect the risk management aspect of AMA. NRCS has chosen to retain the interim final rule's definition of ''resource concern'' to keep it consistent with other USDA programs. As defined in § 1465.3, the term, ''resource concern means a specific natural resource problem that represents a significant concern in a State or region and is likely to be addressed through the implementation of conservation practices by participants.'' Instead of addressing ''risk management'' in the ''resource concern'' definition, NRCS addressed risk management in the program's purpose statement, which is located in § 1465.1. As stated, the purpose of AMA's financial assistance funds are to: ''Construct or improve water management structures; plant trees to form windbreaks or to improve water quality; and mitigate risk through production diversification or resource conservation practices, including soil erosion control, integrated pest management, or the transition to organic farming.''

Another respondent requested clarification on the definition ''Historically underserved producers'' and asked specifically whether producers in the Navajo Nation will be considered ''historically underserved producers.'' The term, ''historically underserved producer'' merges the term ''beginning farmer or rancher,'' ''limited resource farmer or rancher,'' and ''socially disadvantaged farmer or rancher'' to simplify terms within the AMA rule. Farmers and ranchers that meet one or more of these aforementioned terms — beginning, limited resource, or socially disadvantaged — are considered historically underserved for the purposes of AMA. Producers in the Navajo Nation meet the definition of ''socially disadvantaged,'' since in the past they have been subject to racial or ethnic prejudices because of their identity as a group without regard to their individual qualities.

NRCS is amending the definition of ''historically underserved producers'' for editorial clarification to make sure it is understood that the definition includes nonindustrial private forest landowners. The definition, as amended, reads as follows: ''historically underserved producer means an eligible person, joint operation, or legal entity who is a beginning farmer or rancher, socially disadvantaged farmer or rancher, limited resource farmer or rancher, or nonindustrial private forest landowner who meets the beginning, socially disadvantaged, or limited resource qualifications set forth in § 1465.3.''

One respondent requested that NRCS compensate the respondent for providing programmatic support to NRCS to implement a conservation practice. Specifically, the respondent wanted to be compensated for conducting inventories and cultural resource assessments on Indian lands. Section 2706 of the 2008 Act amended the Food Security Act of 1985 (1985 Act) to authorize payments to third party technical service providers (TSPs) for ''related technical assistance services that accelerate program delivery.'' Related technical assistance services include, but are not limited to, conservation planning documentation, payment scheduling and documentation, and other services like cultural resources inventory and assessment, which may accelerate conservation program delivery.

The 2008 Act also authorized TSPs to be used to carry out the AMA program. For this reason and to clarify that TSPs may be used to expedite AMA conservation program delivery, NRCS added § 1465.8 to the final rule to incorporate the TSP provisions used by other NRCS conservation programs. As in the case of Title XII conservation programs, an AMA participant or NRCS may use the services of a qualified TSP to install and implement conservation practices. Technical services provided may include conservation planning; cultural resources studies; conservation practice survey, layout, design, installation, and certification; information, education, and training for producers; and related technical assistance services as described above. In addition to becoming certified TSPs, Indian Tribes may also explore with NRCS the special sole source provisions contained in section 8(a) of the Small Business Administration Act or enter into one or more contribution agreements or cooperative agreements with NRCS to provide professional services.

Section 1465.4 National Priorities

As part of the interim final rule, NRCS added § 1465.4, ''National Priorities,'' and re-designated the subsequent sections accordingly. The new § 1465.4 establishes national priorities to guide State funding allocations, AMA contract selection, and implementation priorities for AMA conservation practices. One respondent requested that paragraph (c) be revised to include State Technical Committees in the establishment of State and local priorities. Section 1261 of the 1985 Act requires the Secretary of Agriculture to establish a technical committee in each State to assist the Secretary in the considerations relating to implementation and technical aspects of the conservation programs authorized under Title XII of the 1985 Act. AMA was authorized by section 524(b) of the Federal Crop Insurance Act, as amended, and therefore, is not a Title XII conservation program. Thus, State Technical Committees are not permitted to provide advice on AMA. However, nothing precludes a State Conservationist from obtaining input from particular Federal, State, Tribal, and local agencies when establishing State and local priorities. NRCS also encourages local input in § 1465.20, where it states: ''* * * the State Conservationist will develop ranking criteria and a ranking process to select applications taking into account national, State, Tribal, and local priorities.'' No changes have been made in this section.

Section 1465.5 Program Requirements

Section 1465.5, ''Program requirements,'' sets forth land and applicant eligibility. NRCS revised § 1465.5(c)(6) of the interim final rule to clarify that AMA participants are subject to Adjust Gross Income (AGI) limitations, as set forth in the 2008 Act's amendments to section 1001D of the 1985 Act. The AGI and program eligibility requirements require NRCS to obtain from legal entities a list of members, including members in embedded entities, along with their social security numbers and percent interest in the legal entity. One respondent requested that a waiver process be implemented so that a contract can proceed if substantially all members of the legal entity are listed. NRCS is bound by section 1001D(b)(2)(A)(i) of the 1985 Act, as amended, which states that a person or legal entity will not be eligible to receive a conservation program payment, such as an AMA payment, if the average adjusted gross income exceeds $1,000,000, unless not less than 66.66 percent of the average adjusted gross income of the person or legal entity is average adjusted gross farm income. The statutory language did not place any exemptions or waiver authority based on the involvement of members within a legal entity. As a result, an applicant is required to list all members of a legal entity. Specifically, text has been added to § 1465.5,

''program requirements,'' that requires participants to ''supply other information, as required by NRCS, to determine payment eligibility as established by 7 CFR part 1400.'' Paragraph (6) has also been added to clarify policies related to Indian Tribes or Indians represented by the Bureau of Indian Affairs (BIA), and paragraphs (7) through (11) have been renumbered accordingly.

One respondent supported the inclusion of publicly-owned land as eligible land. With this in mind, and in an effort to be consistent with other USDA conservation programs, NRCS amends the AMA regulation and removes the requirement that the benefit of the conservation practice on public land address an identified resource concern that is on private land. NRCS has determined that the AMA statute should not be interpreted so narrowly to preclude the ability of producers to enroll part of their overall agricultural or forestry operation simply because the resource concerns exist on publically owned land. USDA considers these lands to be part of the producer's operation if it is a working component of the private agricultural operation. Therefore, NRCS is issuing this final rule that modifies the AMA regulation to authorize an AMA contract to include conservation practices that address an identified resource concern on public land where a participant manages such lands as a working component of their agricultural or forestry operation, and the participant has control of the land for the term of the AMA contract.

Section 1465.6 AMA Plan of Operations

Section 1465.6, ''AMA plan of operations,'' describes the AMA plan of operations (APO) as the document that contains the information related to practices and activities to be implemented under AMA. Section 1465.6 also specifies the requirements for the APO and that participants are responsible for implementing them. No changes have been made in this section.

Section 1465.7 Conservation Practices

Section 1465.7, ''Conservation practices,'' describes how NRCS determines eligible conservation practices. No changes have been made in this section.

Section 1465.8 Technical Services Provided by Qualified Personnel Not Affiliated With USDA

Section 1465.8, ''Technical services provided by qualified personnel not affiliated with USDA,'' has been added to the final rule to address the use of TSPs by NRCS and AMA participants.

Subpart B—Contracts

Section 1465.20 Application for Participation and Selecting Applications for Contracting

Section 1465.20, ''Application for participation and selecting applications for contracting,'' describes the processes for submitting and selecting applications. In the interim final rule, NRCS removed the reference to State Technical Committees providing advice on AMA ranking criteria, since State Technical Committees are permitted only to provide advice on conservation programs authorized by Title XII of the 1985 Act. While the respondent accepted NRCS' rationale for removing State Technical Committees from the criteria development process, the respondent suggested that language be included that requires consultation with the State conservation agencies and local conservation districts. NRCS retains paragraphs (c) and (d) of § 1465.20 which states that the State Conservationist will develop ranking criteria using a locally-led process that takes into account National, State, Tribal, and local priorities. No changes have been made in this section.

Section 1465.21 Contract Requirements

Section 1466.21, ''Contract requirements,'' identifies elements contained within an AMA contract and the responsibilities of the participant who is party to the AMA contract. No changes have been made in this section.

Section 1465.22 Conservation Practice Operation and Maintenance

Section 1465.22, ''Conservation practice operation and maintenance,'' addresses the participant's responsibility for operating and maintaining conservation practices. To further clarify a participant's obligations, NRCS added paragraph (e) to this section to specify that if a participant is not operating and maintaining practices during the contract period, NRCS may terminate and request a refund of payments made for that conservation practice under the contract.

Section 1465.23 Payments

Section 1465.23, ''Payments,'' addresses payments and payment limitations applicable to a participant. NRCS revised paragraph (a) in the interim final rule to allow payments of ''up to 75 percent of the estimated cost of an eligible practice and up to 100 percent of the estimated income foregone'' rather than providing a flat rate of 75 percent. Allowing for a range of payment rates makes it possible to provide reduced rates where participants can implement a conservation practice at a lower cost. This allows the opportunity to distribute AMA funds to more participants. Two respondents supported NRCS' policy to pay up to 75 percent of the estimated incurred cost or up to 100 percent of the estimated income foregone and distributing the money to more participants. One respondent requested that NRCS utilize actual costs when determining income foregone and that the approach used in evaluating income foregone should be consistent. NRCS defines income foregone as ''the annual net income lost from a change in land use, or land taken out of production, or the opportunity cost of accepting less farm income in exchange for improved resource conditions due to the practice.'' An income foregone payment may be based on crop yield losses associated with implementing the practice. For example, this type of payment calculation may apply to a filter strip practice. To establish a filter strip, land is taken out of crop production and planted to an herbaceous cover. The participant will no longer have income from crops on this land or the costs associated with crop production. The costs associated with crop production would be subtracted from the normal crop income received from the area to determine annual estimated income foregone.

Section 1465.24 Contract Modifications, Extensions, and Transfers of Land

Section 1465.24, ''Contract modifications, extensions, and transfers of land,'' addresses contract modifications, changes in land ownership or control of the land, and contract implications if the participant loses control of the land. One respondent specifically supported NRCS' addition of paragraph (f) in the interim final rule to ensure that in the event a conservation practice fails through no fault of the participant, the State Conservationist may issue payments to re-establish the conservation practice in accordance with established payment rates and limitations. No changes have been made in this section.

Section 1465.25 Contract Violations and Terminations

Section 1465.25, ''Contract violations and terminations,'' addresses the procedures that NRCS takes where a violation has occurred or a contract

termination is necessary. One respondent has requested that NRCS further clarify or define the type and extent of documentation that may be necessary to demonstrate hardship claims. NRCS has chosen to further define examples of hardship in its policy in part 512 of Title 440 of the Conservation Programs Manual (440 CPM 512). Documentation varies upon the type of hardship incurred. Examples of hardship may include, but not be limited to, natural disasters (*e.g.,* drought, hurricanes, tornadoes, hail, and pest infestations); farm or ranch buildings and equipment destruction; major illness; death; bankruptcy; or public interest (*e.g.,* military service, public utilities easement or condemnation, and environmental and archeological concerns).

Subpart C—General Administration

Section 1465.30 Appeals

Section 1465.30, ''Appeals,'' references the policies that govern when a producer seeks an appeal to an adverse decision made by NRCS. No changes have been made in this section.

Section 1465.31 Compliance With Regulatory Measures

Section 1465.31, ''Compliance with regulatory measures,'' specifies that the program participant is responsible for ensuring compliance with regulatory measures. No changes have been made in this section.

Section 1465.32 Access to Operating Unit

Section 1465.32, ''Access to operating unit,'' provides notice to applicants, participants, and the public that NRCS has the right to enter an operating unit or tract for the purpose of ascertaining the accuracy of any representations related to contract performance. Specifically, § 1465.32 was amended in the interim final rule to notify potential AMA applicants that an authorized NRCS representative may enter an agricultural operation for the purposes of eligibility determinations. NRCS will continue to provide the participant notice prior to entering the property. One respondent supported this policy, stating that it was important for NRCS to contact the participant prior to exercising the right to access the property to maintain a positive working relationship between the agency and the producer. NRCS concurs with this rationale and has further clarified this policy in the AMA contract to make NRCS and the participant's contract obligations more transparent.

Section 1465.33 Equitable Relief

Section 1465.33, ''Equitable relief,'' outlines the policy when a participant relies upon erroneous advice provided by NRCS or when a participant who is in violation of a program provision is determined to have made a good faith effort to comply with the terms of participation. One respondent supported NRCS' policy on equitable relief. No changes have been made in this section.

Section 1465.34 Offsets and Assignments

Section 1465.34, ''Offsets and assignments,'' governs offsets and withholdings, as well as assignment of payments. No changes have been made in this section.

Section 1465.35 Misrepresentation and Scheme or Device

Section 1465.35, ''Misrepresentation and scheme and device,'' outlines the policies governing producers who have erroneously or fraudulently represented themselves. No changes have been made in this section.

Section 1465.36 Environmental Services Credits for Conservation Improvements

Section 1465.36, ''Environmental services credits for conservation improvements,'' provides policies related to AMA participants who are interested in entering into agreements on land subject to an AMA agreement. NRCS made minor changes to this section to clarify the policy.

List of Subjects in 7 CFR Part 1465

Conservation contract, Conservation plan, Conservation practices, and Soil and water conservation.

■ For the reasons stated in the preamble, the Natural Resources Conservation Service, on behalf of the Commodity Credit Corporation, amends 7 CFR Chapter XIV by revising part 1465 to read as follows:

PART 1465—AGRICULTURAL MANAGEMENT ASSISTANCE

Subpart A—General Provisions

Sec.

Subpart B—Contracts

Subpart C—General Administration

Authority: 7 U.S.C. 1524(b).

Subpart A—General Provisions

§ 1465.1 Purposes and applicability.

Through the Agricultural Management Assistance program (AMA), the Natural Resources Conservation Service (NRCS) provides financial assistance funds annually to producers in 16 statutorily designated States to: Construct or improve water management structures or irrigation structures; plant trees to form windbreaks or to improve water quality; and mitigate risk through production diversification or resource conservation practices including soil erosion control, integrated pest management, or the transition to organic farming. AMA is applicable in Connecticut, Delaware, Hawaii, Maine, Maryland, Massachusetts, Nevada, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Utah, Vermont, West Virginia, and Wyoming.

§ 1465.2 Administration.

(a) Administration and implementation of AMA's conservation provisions for the Commodity Credit Corporation (CCC) is assigned to NRCS, using the funds, facilities, and authorities of the CCC. Accordingly, where NRCS is mentioned in this part, it also refers to the CCC's funds, facilities, and authorities, where applicable.

(b) NRCS will:

(1) Provide overall management and implementation leadership for AMA;

(2) Establish policies, procedures, priorities, and guidance for implementation;

(3) Establish payment limits;

(4) Determine eligible practices;

(5) Develop and approve AMA plans of operation and contracts with selected participants;

(6) Provide technical leadership for implementation, quality assurance, and evaluation of performance;

(7) Make AMA allocation and contract funding decisions; and

(8) Issue payments for completed conservation practices.

(c) No delegation in this part to lower organizational levels will preclude the Chief of NRCS from determining any issues arising under this part or from reversing or modifying any determination made under this part.

§ 1465.3 Definitions.

The following definitions apply to this part and all documents used in accordance with this part, unless specified otherwise:

Agricultural land means cropland, grassland, rangeland, pasture, and other agricultural land on which agricultural or forest-related products or livestock are produced. Other agricultural lands may include cropped woodland, marshes, incidental areas included in the agricultural operation, and other types of agricultural land used for production of livestock.

Agricultural operation means a parcel or parcels of land whether contiguous or noncontiguous, which the producer is listed as the operator or owner/operator in the Farm Service Agency (FSA) record system, which is under the effective control of the producer at the time the producer applies for a contract, and which is operated by the producer with equipment, labor, management and production, forestry, or cultivation practices that are substantially separate from other operations.

AMA plan of operations (APO) means the document that identifies the location and timing of conservation practices that the participant agrees to implement on eligible land in order to address the resource concerns and program purposes. The APO is part of the AMA contract.

Applicant means a person, legal entity, joint operation, or Indian Tribe that has an interest in an agricultural operation, as defined in 7 CFR part 1400, who has requested in writing to participate in AMA.

Beginning farmer or rancher means a person or legal entity who:

(1) Has not operated a farm or ranch, or who has operated a farm or ranch for not more than 10 consecutive years. This requirement applies to all members of an entity who will materially and substantially participate in the operation of the farm or ranch.

(2) In the case of a contract with an individual, individually, or with the immediate family, material and substantial participation requires that the individual provide substantial day-to-day labor and management of the farm or ranch consistent with the practices in the county or State where the farm or ranch is located.

(3) In the case of a contract with an entity or joint operation, all members must materially and substantially participate in the operation of the farm or ranch. Material and substantial participation requires that each of the members provide some amount of the management, or labor and management necessary for day-to-day activities, such that if each of the members did not provide these inputs, operation of the farm or ranch would be seriously impaired.

Chief means the Chief of NRCS, United States Department of Agriculture (USDA), or designee.

Conservation district means any district or unit of State, Tribal, or local government formed under State, Tribal, or territorial law for the express purpose of developing and carrying out a local soil and water conservation program. Such district or unit of government may be referred to as a ''conservation district,'' ''soil conservation district,'' ''soil and water conservation district,'' ''resource conservation district,'' ''natural resource district,'' ''land conservation committee,'' or similar name.

Conservation practice means one or more conservation improvements and activities, including structural practices, land management practices, vegetative practices, forest management, and other improvements that achieve program purposes.

Contract means a legal document that specifies the rights and obligations of any participant accepted into the program. An AMA contract is an agreement for the transfer of assistance from USDA to the participant to share in the costs of applying conservation practices.

Designated conservationist means an NRCS employee whom the State Conservationist has designated as responsible for AMA administration in a specific area.

Historically underserved producer means an eligible person, joint operation, or legal entity who is a beginning farmer or rancher, socially disadvantaged farmer or rancher, limited resource farmer or rancher, or nonindustrial private forest landowner who meets the beginning, socially disadvantaged, or limited resource qualifications set forth in this section.

Indian Tribe means any Indian Tribe, band, nation, or other organized group or community, including any Alaska Native village, or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 *et seq.*) that is eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

Indian land is an inclusive term describing all lands held in trust by the United States for individual Indians or Tribes, or all lands, titles to which are held by individual Indians or Tribes, subject to Federal restrictions against alienation or encumbrance, or all lands which are subject to the rights of use, occupancy, and benefit of certain Tribes. For purposes of this part, the term Indian land also includes land for which the title is held in fee status by Indian Tribes and the United States Government-owned land under the Bureau of Indian Affairs (BIA) jurisdiction.

Joint operation means, as defined in 7 CFR part 1400, a general partnership, joint venture, or other similar business arrangement in which the members are jointly and severally liable for the obligations of the organization.

Legal entity means, as defined in 7 CFR part 1400, an entity created under Federal or State law that: (1) Owns land or an agricultural commodity, product, or livestock; or (2) produces an agricultural commodity, product, or livestock.

Lifespan means the period of time in which a conservation practice should be operated and maintained and used for the intended purpose.

Limited resource farmer or rancher means:

(1) A person with direct or indirect gross farm sales of not more than $155,200 in each of the previous 2 years (adjusted for inflation using the Prices Paid by Farmer Index as compiled by the National Agricultural Statistics Service), and

(2) Has a total household income at or below the national poverty level for a family of four, or less than 50 percent of county median household income in each of the previous 2 years (to be determined annually using Commerce Department data).

Liquidated damages means a sum of money stipulated in the AMA contract that the participant agrees to pay NRCS if the participant fails to adequately complete the terms of the contract. The sum represents an estimate of the technical assistance expenses incurred to service the contract and reflects the difficulties of proof of loss and the inconvenience or non-feasibility of otherwise obtaining an adequate remedy.

Livestock means all animals produced on farms and ranches, as determined by the Chief.

Natural Resources Conservation Service is an agency of USDA which has responsibility for administering AMA using the funds, facilities, and authorities of the CCC.

Nonindustrial private forest land means rural land that has existing tree cover or is suitable for growing trees and is owned by any nonindustrial private individual, group, association, corporation, Indian Tribe, or other private legal entity that has definitive decision-making authority over the land.

Operation and maintenance means work performed by the participant to keep the applied conservation practice functioning for the intended purpose during the conservation practice lifespan. Operation includes the administration, management, and performance of non-maintenance actions needed to keep the completed practice safe and functioning as intended. Maintenance includes work to prevent deterioration of the practice, repairing damage, or replacement of the practice to its original condition if one or more components fail.

Operation and maintenance (O&M) agreement means the document that, in conjunction with the APO, specifies the operation and maintenance responsibilities of the participants for conservation practices installed with AMA assistance.

Participant means a person, legal entity, joint operation, or Indian Tribe that is receiving payment or is responsible for implementing the terms and conditions of an AMA contract.

Payment means the financial assistance provided to the participant based on the estimated costs incurred in performing or implementing conservation practices, including costs for planning, design, materials, equipment, installation, labor, maintenance, management, or training, as well as the estimated income foregone by the producer for the designated conservation practices.

Person means, as defined in 7 CFR part 1400, an individual, natural person and does not include a legal entity.

Producer means a person, legal entity, joint operation, or Indian Tribe that has an interest in the agricultural operation, according to 7 CFR part 1400, or who is engaged in agricultural production or forestry management.

Resource concern means a specific natural resource problem that represents a significant concern in a State or region and is likely to be addressed successfully through the implementation of the conservation practices by participants.

Secretary means the Secretary of USDA.

Socially disadvantaged farmer or rancher means a farmer or rancher who has been subjected to racial or ethnic prejudices because of their identity as a member of a group without regard to their individual qualities.

State Conservationist means the NRCS employee authorized to direct and supervise NRCS activities in a State, Caribbean Area, or Pacific Islands Area.

Structural practice means a conservation practice, including a vegetative practice, that involves establishing, constructing, or installing a site-specific measure to conserve and protect a resource from degradation, or improve soil, water, air, or related natural resources in the most cost-effective manner. Examples include, but are not limited to, animal waste management facilities, terraces, grassed waterways, tailwater pits, livestock water developments, contour grass strips, filterstrips, critical area plantings, tree plantings, establishment or improvement of wildlife habitat, and capping of abandoned wells.

Technical assistance means technical expertise, information, and tools necessary for the conservation of natural resources on land active in agricultural, forestry, or related uses. The term includes the following:

(1) Technical services provided directly to farmers, ranchers, and other eligible entities, such as conservation planning, technical consultation, and assistance with design and implementation of conservation practices; and

(2) Technical infrastructure, including activities, processes, tools, and agency functions needed to support delivery of technical services, such as technical standards, resource inventories, training, data, technology, monitoring, and effects analyses.

Technical Service Provider (TSP) means an individual, private-sector entity, or public agency certified by NRCS to provide technical services to program participants or in lieu of, or on behalf of NRCS.

§ 1465.4 National priorities.

(a) The Chief, with advice from State Conservationists, will identify national priorities to achieve the conservation objectives of AMA.

(b) National priorities will be used to guide annual funding allocations to States. (c) State Conservationists will use national priorities in conjunction with State and local priorities to prioritize and select AMA applications for funding.

(d) NRCS will undertake periodic reviews of the national priorities and the effects of program delivery at the State and local levels to adapt the program to address emerging resource issues.

§ 1465.5 Program requirements.

(a) Participation in AMA is voluntary. The participant, in cooperation with the local conservation district, applies for practice installation for the agricultural operation. NRCS provides payments through contracts to apply needed conservation practices within a time schedule specified in the APO.

(b) The Chief determines the funds available for financial assistance according to the purpose and projected cost for which the financial assistance is provided in a fiscal year. The Chief allocates the funds available to carry out AMA in consideration of national priorities established under § 1465.4.

(c) To be eligible to participate in AMA, an applicant must:

(1) Own or operate an agricultural operation within an applicable State, as listed in 1465.1;

(2) Provide NRCS with written evidence of ownership or legal control for the life of the proposed contract, including the O&M agreement. An exception may be made by the Chief:

(i) In the case of land allotted by the BIA, Tribal land, or other instances in which the Chief determines that there is sufficient assurance of control; or

(ii) If the applicant is a tenant of the land involved in agricultural production, the applicant will provide NRCS with the written concurrence of the landowner in order to apply a structural practice(s);

(3) Submit an application form NRCS–CPA–1200;

(4) Agree to provide all information to NRCS determined to be necessary to assess the merits of a proposed project and to monitor contract compliance;

(5) Provide a list of all members of the legal entity and embedded entities along with members' tax identification numbers and percentage interest in the entity. Where applicable, American Indians, Alaska Natives, and Pacific Islanders may use another unique identification number for each individual eligible for payment;

(6) With regard to contracts with Indian Tribes or Indians represented by the BIA, payments if a BIA or Tribal official certify in writing that no one individual, directly or indirectly, will receive more than the payment limitation. The Tribal entity must also provide, annually, a listing of

individuals and payments made by social security or tax identification number or other unique identification number, during the previous year for calculation of overall payment limitations. The BIA or Tribal entity must also provide, at the request of NRCS, proof of payments made to the person or legal entity that incurred costs or sacrificed income related to conservation practice implementation.

(7) Supply other information, as required by NRCS, to determine payment eligibility as established by 7 CFR part 1400, Adjusted Gross Income;

(8) With regard to any participant that utilizes a unique identification number as an alternative to a tax identification number, the participant will utilize only that identifier for any and all other AMA contracts to which the participant is a party. Violators will be considered to have provided fraudulent representation and be subject to full penalties of § 1465.25;

(9) States, political subdivisions, and entities thereof will not be persons eligible for payment. Any cooperative association of producers that markets commodities for producers will not be considered to be a person eligible for payment;

(10) Be in compliance with the terms of all other USDA-administered conservation program agreements to which the participant is a party; and

(11) Develop and agree to comply with an APO and O&M agreement, as described in § 1465.3.

(d) Land may only be considered for enrollment in AMA if NRCS determines that the land is:

(1) Privately owned land;

(2) Publicly owned land where:

(i) The land is a working component of the participant's agricultural and forestry operation; and

(ii) The participant has control of the land for the term of the contract; and

(iii) The conservation practices to be implemented on the public land are necessary and will contribute to an improvement in the identified resource concern; or

(3) The land is Indian land.

§ 1465.6 AMA plan of operations.

(a) All conservation practices in the APO must be approved by NRCS and developed and carried out in accordance with the applicable NRCS technical guidance.

(b) The participant is responsible for implementing the APO.

(c) The APO must include:

(1) A description of the participant's specific conservation and environmental objectives to be achieved;

(2) To the extent practicable, the quantitative or qualitative goals for achieving the participant's conservation and environmental objectives;

(3) A description of one or more conservation practices in the conservation system, including conservation planning, design, or installation activities to be implemented to achieve the conservation and environmental objectives;

(4) A description of the schedule for implementing the conservation practices, including timing, sequence, operation, and maintenance; and

(5) Information that will enable evaluation of the effectiveness of the plan in achieving the environmental objectives.

(d) An APO may be modified in accordance with § 1465.24.

§ 1465.7 Conservation practices.

(a) The State Conservationist will determine the conservation practices eligible for AMA payments. To be considered eligible conservation practices, the practices must meet the purposes of the AMA as set out in § 1465.1. A list of eligible practices will be available to the public.

(b) The APO includes the schedule of operations, activities, and payment rates of the practices needed to solve identified natural resource concerns.

§ 1465.8 Technical services provided by qualified personnel not affiliated with USDA.

(a) NRCS may use the services of qualified TSPs in performing its responsibilities for technical assistance.

(b) Participants may use technical services from qualified personnel of other Federal, State, local agencies, Indian Tribes, or individuals who are certified as TSPs by NRCS.

(c) Technical services provided by qualified personnel not affiliated with USDA may include, but are not limited to: conservation planning; conservation practice survey, layout, design, installation, and certification; and information, education, and training for producers, and related technical services as defined in 7 CFR part 652.

(d) NRCS retains approval authority of work done by non-NRCS personnel for the purpose of approving AMA payments.

Subpart B—Contracts

§ 1465.20 Applications for participation and selecting applications for contracting.

(a) Any producer who has eligible land may submit an application for participation in AMA at a USDA service center. Producers who are members of a joint operation will file a single application for the joint operation.

(b) NRCS will accept applications throughout the year. The State Conservationist will distribute information on the availability of assistance, national priorities, and the State-specific goals. Information will be provided that explains the process to request assistance.

(c) The State Conservationist will develop ranking criteria and a ranking process to select applications, taking into account national, State, Tribal, and local priorities.

(d) The State Conservationist, or designated conservationist, using a locally-led process will evaluate, rank, and select applications for contracting based on the State-developed ranking criteria and ranking process.

(e) The State Conservationist, or designated conservationist, will work with the applicant to collect the information necessary to evaluate the application using the ranking criteria.

§ 1465.21 Contract requirements.

(a) In order for a participant to receive payments, the participant will enter into a contract agreeing to implement one or more eligible conservation practices. Costs for technical services may be included in the contract.

(b) An AMA contract will:

(1) Encompass all portions of an agricultural operation receiving AMA assistance;

(2) Have a minimum duration of one year after completion of the last practice, but not more than 10 years;

(3) Incorporate all provisions required by law or statute, including participant requirements to:

(i) Not conduct any practices on the agricultural operation that would tend to defeat the purposes of the contract according to § 1465.25;

(ii) Refund any AMA payments received with interest, and forfeit any future payments under AMA, on the violation of a term or condition of the contract, consistent with the provisions of § 1465.25;

(iii) Refund all AMA payments received on the transfer of the right and interest of the producer in land subject to the contract, unless the transferee of the right and interest agrees to assume all obligations, including operation and maintenance of the AMA contract's conservation practices, consistent with the provisions of § 1465.24; and

(iv) Supply information as required by NRCS to determine compliance with the contract and requirements of AMA.

(4) Specify the participant's requirements for operation and maintenance of the applied

conservation practices consistent with the provisions of § 1465.22; and

(5) Specify any other provision determined necessary or appropriate by NRCS.

(c) The participant must apply the practice(s) according to the schedule set out in the APO.

§ 1465.22 Conservation practice operation and maintenance.

(a) The contract will incorporate the O&M agreement that addresses the operation and maintenance of the conservation practices applied under the contract.

(b) NRCS expects the participant to operate and maintain each conservation practice installed under the contract for its intended purpose for the conservation practice lifespan as specified in the O&M agreement.

(c) NRCS may periodically inspect the conservation practice(s) during the contract duration to ensure that operation and maintenance requirements are being carried out, and that the conservation practice is fulfilling its intended objectives.

(d) Conservation practices installed before the contract execution, but included in the contract to obtain the environmental benefits agreed upon, must be operated and maintained as specified in the contract and O&M agreement.

(e) If NRCS finds during the contract that a participant is not operating and maintaining practices in an appropriate manner, NRCS may terminate and request a refund of payments made for that conservation practice under the contract.

(f) In the event a conservation practice fails through no fault of the participant, the State Conservationist may issue payments to re-establish the conservation practice, at the rates established in accordance with § 1465.23, provided such payments do not exceed the payment limitation requirements as set forth in § 1465.23.

§ 1465.23 Payments.

(a) The Federal share of payments to a participant will be:

(1) Up to 75 percent of the estimated incurred cost or 100 percent of the estimated income foregone of an eligible practice, except as provided in (a)(2) of this section.

(2) In the case of historically underserved producers, the payment rate will be the applicable rate and an additional rate that is not less than 25 percent above the applicable rate, provided that this increase does not exceed 90 percent of the estimated incurred costs or estimated income foregone.

(3) In no instance will the total financial contributions for an eligible practice from other sources exceed 100 percent of the estimated incurred cost of the practice.

(b) Participants may contribute their portion of the estimated costs of practices through in-kind contributions, including labor and materials, providing the materials contributed meet the NRCS standard and specifications for the practice being installed.

(c) Payments for practices applied prior to application or contract approval—

(1) Payments will not be made to a participant for a conservation practice that was applied prior to application for the program.

(2) Payments will not be made to a participant for a conservation practice that was initiated or implemented prior to contract approval, unless the participant obtained a waiver from the State Conservationist, or designated conservationist, prior to practice implementation.

(d) The total amount of payments paid to a person or legal entity under this part may not exceed $50,000 for any fiscal year.

(e) For purposes of applying the payment limitations provided for in this section, NRCS will use the provisions in 7 CFR part 1400, Payment Limitation and Payment Eligibility.

(f) A participant will not be eligible for payments for conservation practices on eligible land if the participant receives payments or other benefits for the same practice on the same land under any other conservation program administered by USDA.

(g) The participant and NRCS must certify that a conservation practice is completed in accordance with the contract before NRCS will approve any payment.

(h) Subject to fund availability, the payment rates for conservation practices scheduled after the year of contract obligation may be adjusted to reflect increased costs.

§ 1465.24 Contract modifications, extensions, and transfers of land.

(a) The participant and NRCS may modify a contract if both parties agree to the contract modification, the APO is revised in accordance with NRCS requirements, and the designated conservationist approves the modified contract.

(b) It is the participant's responsibility to notify NRCS when he or she either anticipates the voluntary or involuntary loss of control of the land.

(c) The participant and NRCS may mutually agree to transfer a contract to another party.

(1) To receive an AMA payment, the transferee must be determined by NRCS to be eligible to participate in AMA and will assume full responsibility under the contract, including the O&M agreement for those conservation practices already installed and those conservation practices to be installed as a condition of the contract.

(2) With respect to any and all payment owed to participants who wish to transfer ownership or control of land subject to a contract, the division of payment will be determined by the original party and the party's successor. In the event of a dispute or claim on the distribution of payments, NRCS may withhold payments without the accrual of interest pending a settlement or adjudication on the rights to the funds.

(d) NRCS may require a participant to refund all or a portion of any assistance earned under AMA if the participant sells or loses control of the land under an AMA contract, and the successor in interest is not eligible or refuses to accept future payments to participate in the AMA or refuses to assume responsibility under the contract.

(e) The contract participants will be jointly and severally responsible for refunding the payments with applicable interest pursuant to paragraph (d) of this section.

§ 1465.25 Contract violations and termination.

(a) If NRCS determines that a participant is in violation of the terms of a contract, O&M agreement, or other documents incorporated into the contract, NRCS will give the participant notice and 60 days, unless otherwise determined by the State Conservationist, to correct the violation and comply with the terms of the contract and attachments thereto. If a participant continues in violation, the State Conservationist may terminate the AMA contract.

(b) Notwithstanding the provisions of (a) of this section, a contract termination will be effective immediately upon a determination by the State Conservationist that the participant has submitted false information or filed a false claim, or engaged in any act, scheme, or device for which a finding of ineligibility for payments is permitted under the provisions of § 1465.35, or in a case in which the actions of the party involved are deemed to be sufficiently purposeful or negligent to warrant a termination without delay.

(c) If NRCS terminates a contract, the participant will forfeit all rights to future payments under the contract and refund all or part of the payments received, plus interest. Participants

violating AMA contracts may be determined ineligible for future NRCS-administered conservation program funding.

(1) The State Conservationist may require only a partial refund of the payments received if the State Conservationist determines that a previously installed conservation practice can function independently and is not affected by the violation or the absence of other conservation practices that would have been installed under the contract.

(2) If NRCS terminates a contract due to breach of contract, or the participant voluntarily terminates the contract before any contractual payments have been made, the participant will forfeit all rights for further payments under the contract and will pay such liquidated damages as prescribed in the contract. The State Conservationist will have the option to waive the liquidated damages depending upon the circumstances of the case.

(i) When making all contract termination decisions, NRCS may reduce the amount of money owed by the participant by a proportion that reflects the good faith effort of the participant to comply with the contract or the existence of hardships beyond the participant's control that have prevented compliance with the contract. If the participant claims hardship, that claim must be well documented and cannot have existed when the applicant applied for participation in the program.

(ii) The participant may voluntarily terminate a contract if NRCS agrees based on NRCS' determination that termination is in the public interest.

(iii) In carrying out NRCS' role in this section, NRCS may consult with the local conservation district.

Subpart C—General Administration

§ 1465.30 Appeals.

(a) A participant may obtain administrative review of an adverse decision under AMA in accordance with 7 CFR parts 11 and 614, except as provided in paragraph (b) of this section.

(b) The following decisions are not appealable:

(1) Payment rates, payment limits;

(2) Funding allocations;

(3) Eligible conservation practices; and

(4) Other matters of general applicability, including:

(i) Technical standards and formulas;

(ii) Denial of assistance due to lack of funds or authority; or

(iii) Science-based formulas and criteria.

§ 1465.31 Compliance with regulatory measures.

Participants who carry out conservation practices will be responsible for obtaining the authorities, rights, easements, permits, or other approvals necessary for the implementation, operation, and maintenance of the conservation practices in keeping with applicable laws and regulations. Participants will be responsible for compliance with all laws and for all effects or actions resulting from the participant's performance under the contract.

§ 1465.32 Access to operating unit.

Any authorized NRCS representative will have the right to enter an operating unit or tract for the purpose of determining eligibility and for ascertaining the accuracy of any representations related to contracts and performance. Access will include the right to provide technical assistance; determine eligibility; inspect any work undertaken under the contracts, including the APO and O&M agreement; and collect information necessary to evaluate the conservation practice performance as specified in the contracts. The NRCS representative will make an effort to contact the participant prior to exercising this provision.

§ 1465.33 Equitable relief.

(a) If a participant relied upon the advice or action of any authorized NRCS representative and did not know, or have reason to know, that the action or advice was improper or erroneous, the participant may be eligible for equitable relief under 7 CFR part 635, section 635.3. The financial or technical liability for any action by a participant that was taken based on the advice of an NRCS certified TSP is the responsibility of the certified TSP and will not be assumed by NRCS when NRCS authorizes payment.

(b) If a participant has been found in violation of a provision of the AMA contract or any document incorporated by reference through failure to comply fully with that provision, the participant may be eligible for equitable relief under 7 CFR part 635, section 635.4.

§ 1465.34 Offsets and assignments.

(a) Except as provided in paragraph (b) of this section, any payment or portion thereof to any participant will be made without regard to questions of Title under State law and without regard to any claim or lien against the crop, or proceeds thereof, in favor of the owner or any other creditor except agencies of the United States Government. The regulations governing offsets and withholdings found at 7 CFR part 1403 will be applicable to contract payments.

(b) AMA participants may assign any payments in accordance with 7 CFR part 1404.

§ 1465.35 Misrepresentation and scheme or device.

(a) A participant who is determined to have erroneously represented any fact affecting an AMA determination made in accordance with this part will not be entitled to contract payments and must refund to NRCS all payments plus interest, as determined in accordance with 7 CFR part 1403.

(b) A participant will refund to NRCS all payments, plus interest, as determined by NRCS with respect to all NRCS contracts to which they are a party if they are determined to have knowingly:

(1) Adopted any scheme or device that tends to defeat the purpose of AMA;

(2) Made any fraudulent representation;

(3) Adopted any scheme or device for the purpose of depriving any tenant or sharecropper of the payments to which such person would otherwise be entitled under the program; or

(4) Misrepresented any fact affecting an AMA determination.

(c) Where paragraph (a) or (b) of this section applies, the participant's interest in all contracts will be terminated. In accordance with § 1465.25(c), NRCS may determine the producer ineligible for future funding from any NRCS conservation programs.

§ 1465.36 Environmental services credits for conservation improvements.

NRCS recognizes that environmental benefits will be achieved by implementing conservation practices funded through AMA, and that environmental credits may be gained as a result of implementing activities compatible with the purposes of an AMA contract. NRCS asserts no direct or indirect interest on these credits. However, NRCS retains the authority to ensure that operation and maintenance requirements for AMA-funded improvements are met, consistent with § 1465.21 and § 1465.22. Where activities may impact the land under an AMA contract, participants are highly encouraged to request an operation and maintenance compatibility determination prior to entering into any credit agreements. The AMA conservation program contract may be modified in accordance with policies outlined in § 1465.24 provided the modifications meet AMA purposes and are in compliance with this part.

Signed this 1st day of December 2009, in Washington, DC.

Dave White,

Vice President, Commodity Credit Corporation and Chief, Natural Resources Conservation Service.

[FR Doc. E9–29070 Filed 12–7–09; 8:45 am]

BILLING CODE 3410–16–P

DEPARTMENT OF HOMELAND SECURITY

Bureau of Customs and Border Protection

19 CFR Part 101

[CBP Dec. 09–45]

Technical Amendments to List of CBP Preclearance Offices in Foreign Countries: Addition of Halifax, Canada and Shannon, Ireland

AGENCY: Customs and Border Protection, DHS.

ACTION: Final rule; technical amendments.

SUMMARY: This document amends title 19 of the Code of Federal Regulations (CFR) to reflect that U.S. Customs and Border Protection (CBP) has added preclearance stations in Halifax, Canada and Shannon, Ireland. CBP officers at preclearance stations conduct inspections and examinations to ensure compliance with U.S. customs, immigration, and agriculture laws, as well as other laws enforced by CBP at the U.S. border. Such inspections and examinations prior to arrival in the United States generally enable passengers to exit the domestic terminal or connect directly to a U.S. domestic flight without undergoing further CBP processing.

DATES: *Effective Date:* December 8, 2009.

FOR FURTHER INFORMATION CONTACT: Kathleen Conway, Office of Field Operations, Preclearance Operations, (202) 344–1759.

SUPPLEMENTARY INFORMATION:

Background

CBP preclearance operations have been in existence since 1952. Preclearance facilities are established through the cooperative efforts of CBP, foreign government representatives, and the local airport authorities and are evidenced with signed preclearance agreements. Each facility is staffed with CBP officers responsible for conducting inspections and examinations in connection with preclearing passengers bound for the United States. Generally, passengers who are inspected at a preclearance facility are permitted to arrive at a U.S. domestic facility and exit the U.S. domestic terminal upon arrival or connect directly to a U.S. domestic flight without further CBP processing. Preclearance facilities primarily serve to facilitate low risk passengers, relieve passenger congestion at Federal inspection facilities in the United States, and enhance security in the air environment through the screening and inspection of passengers prior to their arrival in the United States. In Fiscal Year 2008, over 14.9 million passengers were processed at preclearance locations. This figure represents more than 15 percent of all commercial air passengers cleared by CBP in 2008.

The Agreement on Air Transport Preclearance Between the Government of the United States of America and the Government of Canada was signed on January 18, 2001. Preclearance operations began in Halifax, Canada on October 4, 2006. The Halifax preclearance station is open for use by commercial flights.

The Agreement Between the Government of the United States of America and the Government of Ireland on Air Transport Preclearance was signed on November 17, 2008. Preclearance operations began in Shannon, Ireland on August 5, 2009. The Shannon preclearance station is open for use by commercial flights.

Section 101.5 of the CBP regulations (19 CFR 101.5) sets forth a list of CBP preclearance offices in foreign countries. This document amends this section to add Halifax, Canada and Shannon, Ireland to the list of preclearance offices, and to reflect the nomenclature changes made necessary by the transfer of the legacy U.S. Customs Service of the Department of the Treasury to the Department of Homeland Security (DHS) and DHS' subsequent renaming of the agency as U.S. Customs and Border Protection (CBP) on March 31, 2007 (*see* 72 FR 20131, dated April 23, 2007).

Inapplicability of Public Notice and Delayed Effective Date Requirements

This amendment reflects the addition of two new CBP preclearance offices that were established through signed agreements between the United States and the respective host nation. Accordingly, pursuant to 5 U.S.C. 553(b)(3)(B), notice and public procedure are unnecessary. For the same reason, pursuant to 5 U.S.C. 553(d)(3), a delayed effective date is not required.

The Regulatory Flexibility Act and Executive Order 12866

Because no notice of proposed rulemaking is required, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) do not apply. This amendment does not meet the criteria for a ''significant regulatory action'' as specified in Executive Order 12866.

Signing Authority

This document is being issued in accordance with 19 CFR 0.2(a).

List of Subjects in 19 CFR Part 101

Customs duties and inspection, Customs ports of entry, Foreign trade statistics, Imports, Organization and functions (Government agencies), Shipments, Vessels.

Amendments to Regulations

■ For the reasons set forth above, Part 101 of the Code of Federal Regulations (19 CFR part 101) is amended as set forth below.

PART 101—GENERAL PROVISIONS

■ 1. The general authority citation for part 101 and the specific authority citation for section 101.5 continue to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 2, 66, 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States), 1623, 1624, 1646a.

* * * * *

Section 101.5 also issued under 19 U.S.C. 1629.

* * * * *

■ 2. Revise § 101.5 to read as follows:

§ 101.5 CBP preclearance offices in foreign countries.

Listed below are the preclearance offices in foreign countries where CBP officers are located. A Director, Preclearance, located in the Office of Field Operations at CBP Headquarters, is the responsible CBP officer exercising supervisory control over all preclearance offices.

Country	CBP office
Aruba	Orangestad.
The Bahamas	Freeport.
	Nassau.
Bermuda	Kindley Field.
Canada	Calgary, Alberta.
	Edmonton, Alberta.
	Halifax, Nova Scotia.
	Montreal, Quebec.
	Ottawa, Ontario.
	Toronto, Ontario.
	Vancouver, British Columbia.
	Winnipeg, Manitoba.
Ireland	Shannon.

Dated: December 3, 2009.

Jayson P. Ahern,

Acting Commissioner, U.S. Customs and Border Protection.

[FR Doc. E9–29190 Filed 12–7–09; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF THE TREASURY

Alcohol and Tobacco Tax and Trade Bureau

27 CFR Part 9

[Docket No. TTB–2007–0067; T.D. TTB–83; Ref: Notice Nos. 36 and 77]

RIN 1513–AA92

Establishment of the Calistoga Viticultural Area (2003R–496P)

AGENCY: Alcohol and Tobacco Tax and Trade Bureau, Treasury.

ACTION: Final rule; Treasury decision.

SUMMARY: This Treasury decision establishes the Calistoga viticultural area in Napa County, California. The viticultural area is entirely within the existing Napa Valley viticultural area. We designate viticultural areas to allow vintners to better describe the origin of their wines and to allow consumers to better identify wines they may purchase.

DATES: *Effective Date:* January 7, 2010.

FOR FURTHER INFORMATION CONTACT: Amy R. Greenberg, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street, NW., Washington, DC 20220; telephone 202–453–2265.

SUPPLEMENTARY INFORMATION:

Background

TTB Authority

Section 105(e) of the Federal Alcohol Administration Act (FAA Act), 27 U.S.C. 205(e), authorizes the Secretary of the Treasury to prescribe regulations for the labeling of wine, distilled spirits, and malt beverages. The FAA Act requires that these regulations, among other things, prohibit consumer deception and the use of misleading statements on labels, and ensure that labels provide the consumer with adequate information as to the identity and quality of the product. Section 105(e) of the FAA Act also requires that a person obtain a certificate of label approval (COLA) or a certificate of exemption, as appropriate, covering wine, distilled spirits, and malt beverages before bottling the product or removing the product from customs custody, in accordance with regulations prescribed by the Secretary. The Alcohol and Tobacco Tax and Trade Bureau (TTB) administers the regulations promulgated under the FAA Act.

Part 4 of the TTB regulations (27 CFR part 4) allows the establishment of definitive viticultural areas and the use of their names as appellations of origin on wine labels and in wine advertisements.

Viticultural Areas Designation

Section 4.25(e)(1)(i) of the TTB regulations (27 CFR 4.25(e)(1)(i)) defines a viticultural area for American wine as a delimited grape-growing region distinguishable by geographical features, the boundaries of which have been recognized and defined in part 9 of the regulations (27 CFR part 9). The establishment of viticultural areas allows vintners to describe more specifically the origin of their wines to consumers and allows consumers to attribute a given quality, reputation, or other characteristic of a wine made from grapes grown in an area to its geographic origin. Establishment of a viticultural area is neither an approval nor an endorsement by TTB of the wine produced in that area.

Use of Viticultural Area Names on Wine Labels

For a wine to be labeled with a viticultural area name or with a brand name that includes a viticultural area name or other term identified as being viticulturally significant in part 9 of the TTB regulations, at least 85 percent of the wine must be derived from grapes grown within the area represented by that name or other term, and the wine must meet the other conditions listed in 27 CFR 4.25(e)(3). Under the provisions of 27 CFR 4.39(i), a wine may not be labeled with a brand name that contains a geographic name having viticultural significance unless the wine meets the appellation of origin requirements for the geographic area named. There is an exception for brand names used in existing certificates of label approval issued prior to July 7, 1986, which meet certain criteria set forth in that paragraph (see 27 CFR 4.39(i)(2)). Under 27 CFR 4.39(i)(3), a name has viticultural significance when it is the name of a state or county (or the foreign equivalents), when approved as a viticultural area in part 9 of the TTB regulations or by a foreign government, or when found to have viticultural significance by the appropriate TTB officer.

If the wine is not eligible for labeling with the viticultural area name or other viticulturally significant term and that name or term appears in the brand name, then the label is not in compliance and the bottler must change the brand name (and have an approved COLA for that brand name). Similarly, if the viticultural area name or other viticulturally significant term appears in another reference on the label in a misleading manner, the bottler would have to relabel the product in order to market it.

Viticultural Area Petitions

Section 4.25(e)(2) of the TTB regulations outlines the procedure for proposing an American viticultural area and provides that any interested party may petition TTB to establish a grape-growing region as a viticultural area. Section 9.3(b) of the TTB regulations requires the petition to include—

- Evidence that the proposed viticultural area is locally and/or nationally known by the name specified in the petition;
- Historical or current evidence that supports setting the boundary of the proposed viticultural area as the petition specifies;
- Evidence relating to the geographical features, such as climate, soils, elevation, and physical features, that distinguish the proposed viticultural area from surrounding areas;
- A description of the specific boundary of the proposed viticultural area, based on features found on United States Geological Survey (USGS) maps; and
- A copy of the appropriate USGS map(s) with the proposed viticultural area boundary prominently marked.

I. Calistoga Petition

On behalf of interested parties in the Calistoga viticultural community, James P. ''Bo'' Barrett of Chateau Montelena, a Calistoga, California, winery and vineyard, petitioned TTB to establish ''Calistoga'' as an American viticultural area. Located in northwestern Napa County, California, the proposed area surrounds the town of Calistoga and is entirely within the existing Napa Valley viticultural area described in 27 CFR 9.23. Below, we summarize the evidence presented in the petition.

Name Evidence

The petitioner submitted the following as evidence that the proposed viticultural area described in the petition is locally and nationally known as Calistoga:

- Excerpts from Charles L. Sullivan's book, ''Napa Wine: A History from Mission Days to Present,'' explaining that Sam Brannan founded the town of Calistoga in 1857 and established

vineyards there in 1862. Sullivan's book includes viticultural and winery census data circa 1880, which all report Calistoga separately from other Napa County grape-growing regions. Sullivan's map of Napa wineries in 1893 shows a significant clustering of wineries near Calistoga distinctly separate from the wineries found in surrounding areas.

• Excerpts from ''The University of California/Sotheby Book of California Wine,'' which note Sam Brannan's first vineyard planting in Calistoga.

• Excerpts from an 1881 book, ''History of Napa and Lake Counties,'' showing three Napa County viticultural districts—Calistoga, St. Helena, and Napa.

• Excerpts from Leon Adams' 1973 book, ''The Wines of America,'' referring to Calistoga as a specific grape-growing area.

• Excerpts from Hugh Johnson's 1983 book, ''Hugh Johnson's Modern Encyclopedia of Wine,'' listing Calistoga among his list of ''unofficially recognized appellations or sub-areas.'' The petitioner explains that 10 of the 12 defined sub-areas listed in this book are now designated as American viticultural areas.

• Excerpts from André Dominé's book, ''Wine,'' recognizing Calistoga as a distinct region within Napa Valley and noting that ''the bay influences the weather less as the valley rises up toward Calistoga, which is classified as a Region III area.''

• Excerpts from James Laube's 1989 book, ''California's Great Cabernets,'' which explain that for the purposes of the book, ''a 'commune' system within Napa Valley is utilized to differentiate where grapes are grown within the valley as well as to analyze regional styles of wines.'' In his list, Laube includes Calistoga equally among the other nine Napa Valley ''communes.'' The petition notes that 9 of the 10 communes listed are now TTB-approved viticultural areas.

• An excerpt from James Halliday's book, ''Wine Atlas of California,'' which, the petitioner states, ''so definitively covers the Calistoga area that the chapter in his book could provide most of the evidential requirements for this entire petition.''

• A brief summary of ''Calistoga's Wine History'' by Calistoga Winery proprietor Jim Summers, which, the petitioner states, ''includes a more historical perspective in the long recognition of Calistoga as a viticultural area.''

Boundary Evidence

The established viticultural areas surrounding the proposed Calistoga viticultural area define a portion of its boundaries. The existing St. Helena viticultural area (27 CFR 9.149) northwestern boundary defines the Calistoga southeastern boundary, while the existing Diamond Mountain District area (27 CFR 9.166) northeastern boundary defines the Calistoga southwestern boundary. The Napa-Sonoma county line, which forms the Napa Valley viticultural area boundary in the northwestern corner of Napa County, defines the Calistoga western and northern boundaries. The 880-foot elevation line, beyond which lies rugged, unplantable terrain, defines Calistoga's eastern limit and returns the boundary line to its starting point.

Distinguishing Features

The petition included, as evidence of the proposed Calistoga viticultural area's unique growing conditions, a report written by Jonathan Swinchatt, PhD, of EarthVision, Inc.

Geologic and Geographic Features

Dr. Swinchatt's report indicated that the proposed Calistoga viticultural area is distinguished from surrounding areas by its geographic and geologic features. Dr. Swinchatt explained:

The entirety of the proposed viticultural area is underlain by volcanic bedrock, part of the more widespread Sonoma Volcanics that occur in the Vaca Mountains, in the northern Mayacama Mountains, bordering the lower slopes of the southern Mayacamas Mountains, and in Sonoma County. All the rock materials in the proposed viticultural area—bedrock and sediments—are part of, or derived from, the Sonoma Volcanics. These rocks comprise lava flows, ash-fall tuffs, welded tuffs, pyroclastic flows, mudflows, and ignimbrites. Their composition is largely andesitic with some rhyolitic rocks admixed. AVAs [American Viticultural Areas] farther to the south—St. Helena, Rutherford, and Oakville, in particular—exhibit significantly greater geologic diversity across their width, being underlain primarily by marine sedimentary rocks on the west side of the valley but by volcanic rocks on the east. In addition, these AVAs contain alluvial fan environments on their edges, and fluvial (river) environments in their more central parts. The proposed Calistoga AVA is topographically more diverse but geologically more uniform than these other AVAs that include valley floor environments. The mineralogy and chemistry of the substrate throughout the proposed viticultural area reflects the common source of the granular materials in the Sonoma Volcanics.

In the mountains, vineyards are planted in colluvium-sedimentary particles that have been transformed from the parent bedrock through weathering processes and have accumulated either in place or moved only a short distance. The upland soils are dominantly excessively drained, gravelly loams, very stony loams, and loams, on steep slopes. Most of the breakdown products of weathering have been transported by streams into the valley; much of the finer material has been transported from the area by the Napa River, leaving coarser sediments behind throughout much of the proposed viticultural area.

Alluvial fans have formed at the mouths of most of the drainages, particularly along the northeast side of the valley at Dutch Henry Canyon, Simmons Canyon, Jericho Canyon, and north of Tubbs Lane at the headwaters of the Napa River in Kimball Canyon. At all these locations, cobbly and gravelly loams extend well out onto the valley floor, mixed here and there with finer-grained sediments. On the southwest side, small fans occur at the mouths of Diamond Creek, Nash Creek, and Ritchie Creek. These locations are characterized by cobbly and gravelly loams. Coarse sediments characterize the valley floor throughout the extent of the proposed viticultural area, the finer-grained materials having been transported out of the region by the waters of the Napa River. Soils throughout the proposed viticultural area are loams, gravelly loams, cobbly loams, often with boulders, some with admixtures of silt and clay—clay-rich soils are of limited distribution. These sediments are well drained, with admixtures of clay providing water-holding capacity. Further south in the Napa Valley, gravelly loams and loams are characteristic only of the upper reaches of the alluvial fans that line the valley, while the valley center is often covered by much finer, clay-rich, material.

Climatic Features

In addition to the unique geographic and geologic features of the proposed Calistoga viticultural area, Dr. Swinchatt's report indicated that its unique climatic features further distinguish the proposed Calistoga viticultural area from surrounding areas. Dr. Swinchatt explained:

Climatic information in our report for the Napa Valley Vintners' Association is based on data from DAYMET.org, a website that provides climatic information throughout the United States. DAYMET data is based on a computer algorithm that allows the extension of data from scattered weather stations into areas of complex topography. The algorithm was tested over 400,000 square kilometers in Washington State and found to be accurate within 1.2 degrees centigrade for temperature prediction and to be able to predict rainfall with an 83 percent accuracy.

Heat summation in degree days, defined as the total number of hours above 50 degrees Fahrenheit, is the accepted general measure of temperature and solar insolation in the wine industry. While heat summation is only a general indicator of regional temperature, it provides a more useful view than the limited temperature data from one or two available weather stations. Temperature—climate in general—can vary over distances of a few hundred feet or less, so that temperature measurements at one or two locations mean

little within a regional context. Under these conditions, DAYMET heat summation data provides as good a measure of regional conditions as is available.

Examination of DAYMET data indicates that most of the proposed viticultural area—mountain slopes and valley floor alike—lies within Region III, defined as the range of 3,000 to 3,500 degree days. Only a small area of the valley floor in the proposed viticultural district—east of the restriction in the valley formed by the ridge just west of the mouth of Dutch Henry Creek—lies within low region IV. The difference is well within the limits of accuracy of the data, indicating that the entire proposed viticultural area has a similar temperature profile. Farther south, valley floor vineyards are exposed to significantly different temperature conditions than those in the hills; in the Calistoga region, valley floor and hills appear to be part of a single climatic regime. This regime is characterized by hot days and cool nights, conditions ideal for a combination of ripening grapes but maintaining good acid balance.

One of the long-standing climatic assumptions in the Napa Valley is that Calistoga has the highest temperatures of any location within the valley. Temperature data and anecdotal evidence, however, dispute this assumption, both indicating that the hottest part of the valley is a small region just west closer of Bale Lane. Hottest average temperatures in August (over the 18 year period from 1980 ton 1997) occur from Stags Leap District to south of Dutch Henry Canyon, along the base of the Vaca Mountains.

The Calistoga AVA is cooled by air currents drawn in from the Russian River through the northwestern corner of the mountain heights. These are drawn in to replace hot air rising from the valley, currents that used to support sailplanes headquartered at the Gliderport at Calistoga. In addition, cooling breezes flow down the slopes of both the Vaca and Mayacamas Mountains in the later afternoon. Daytime peak temperatures reach about 100 degrees at mid-day. The heated air rises by convection, drawing in cooler air form the Russian River, the breezes continuing after sunset, cooling the valley floor to about 65 degrees. Further cooling occurs, on fog free nights, driven by cool air moving downslope from the mountains providing additional cooling of 12 to 15 degrees.

Minimum nighttime temperatures often average about 50 degrees, giving a diurnal temperature range that sometimes is greater than 50 degrees. Vintners in the proposed viticultural areas hold that this large diurnal variation is one of the main influences on the character of wines from the region. The hot daytime temperatures provide color and big berry fruit, while the cool nights provide good acid balance for structure and develop power in the wines. The character of wines in the southeastern-most corner of the proposed viticultural district, south of the ''Sterling Hill'' between Maple and Dunaweal Lanes is somewhat softer due to higher nighttime temperatures.

In its southern and central portions, the Napa Valley trends northwest-southeast, with slopes facing mainly northeast and southwest, modified by the drainages that cut the slopes that add diversity to the aspect presented by vineyards to the sun. In its northern portions, however, the trend of the valley is closer to west-east, with the major slopes facing just east of north (in the Mayacamas Mountains) and just west of south (in the Vaca Mountains). A slope aspect map indicates also that the valley floor has very little flat ground, most of it reflects the slopes of alluvial fans, gentle on the north (such as at Dutch Henry Canyon) and steeper on the south. Slope aspect and exposure to the sun in the Calistoga region thus is quite distinct from that in any other AVA within the Napa Valley region.

Rainfall in the Calistoga region is typically higher than elsewhere in the area, with the highest rainfall recorded just outside the northern perimeter of the proposed viticultural area, on Mount St. Helena. Precipitation is highest in the mountains, up to 60 plus inches per year, and lowest in the valley, but year-to-year variation is large, as it is elsewhere in the Napa Valley region. DAYMET data for the years 1990 to 1997 indicate that precipitation ranged from just over 20 inches to over 55 inches on the valley floor, and from about 25 inches to over 65 inches in the surrounding mountains. Measures of average rainfall thus have little meaning.

II. Notice No. 36

On March 31, 2005, TTB published in the **Federal Register** (70 FR 16451) as Notice No. 36 a notice of proposed rulemaking regarding the establishment of a ''Calistoga'' viticultural area. In that notice, we requested comments from all interested persons by May 31, 2005. TTB received two brief comments regarding Notice No. 36 before the close of the comment period. Both comments fully supported the establishment of the Calistoga viticultural area.

After the close of the comment period, we received representations on behalf of two entities opposing the establishment of the Calistoga viticultural area as proposed because the brand names used by these entities contain the name ''Calistoga'' and, upon establishment of the Calistoga viticultural area, a brand name that included the ''Calistoga'' name could be used on a label only if the wine in the bottle met the appellation of origin requirements for that viticultural area, or the brand name were used on certificates of label approval issued prior to July 7, 1986, and met the conditions under the § 4.39(i)(2) ''grandfather'' provision. Both indicated that, under their existing business practices, their wines would not meet the appellation of origin requirements for use of the Calistoga viticultural area name on their wine labels and that, additionally, neither would meet the conditions of the ''grandfather'' provision. The two entities in question are Calistoga Partners, L.P., d.b.a. Calistoga Cellars, and Chateau Calistoga LLC, which uses ''Calistoga Estate'' as its trade name, and they are referred to in this preamble as ''Calistoga Cellars'' and ''Calistoga Estate,'' respectively.

In a written submission to TTB, representatives of Calistoga Cellars expressed opposition to the establishment of the Calistoga viticultural area due to the impact the establishment of an area named ''Calistoga'' would have on the winery and its existing wine labels. In particular, Calistoga Cellars noted that it has been using the ''Calistoga Cellars'' name on wine labels since 1998. The letter also stated that Calistoga Cellars had invested millions of dollars and years of effort in building the trade name, trademark, and brand name ''Calistoga Cellars,'' and that losing the use of the name or being restricted in its use would materially impact the winery. According to the letter, Calistoga Cellars produced about 8,500 cases of wine a year and sold in about 10 states. As to the merits of a ''Calistoga'' viticultural area, Calistoga Cellars argued that the term ''Calistoga'' is most often associated with the town of Calistoga and that the town is known as a tourist destination rather than a specific viticultural area.

For these reasons, Calistoga Cellars requested that TTB: (1) Reopen the public comment period to allow it and others to provide additional comment on alternative solutions that would protect Calistoga brand names; (2) exempt Calistoga Cellars from any restrictive consequences resulting from the establishment of the Calistoga viticultural area, by providing a specific ''grandfather'' provision for that brand name; (3) delay approval of the viticultural area until an industry-wide solution is implemented to protect Calistoga Cellars; or (4) allow Calistoga Cellars to continue to use its existing labels with a TTB-approved notice on the back label.

Also in a written submission to TTB, representatives of Calistoga Estate opposed the establishment of the Calistoga viticultural area. According to the letter, in 2005 Chateau Calistoga LLC purchased a small estate in the Calistoga area which had no vineyards of its own. The Calistoga Estate wines were made under contract with another winery, Adler Fels in Santa Rosa, California, and produced with grapes from the Napa Region, but not necessarily from the Calistoga region. This commenter stated that Calistoga Estate had spent thousands of dollars and a considerable amount of time

building its brand name, selling the wine in six states and the District of Columbia and planned to add two additional states, and urged that TTB consider some relief for that brand name.

III. Notice No. 77

On November 20, 2007, TTB published in the **Federal Register** (72 FR 65256) as Notice No. 77 a new proposal for the establishment of the Calistoga viticultural area for public comment. This new proposal included a limited ''grandfather'' protection for some brand names, as explained later in this preamble.

In Notice No. 77, TTB stated that the original petition included sufficient evidence of the viticultural distinctiveness of the Calistoga area and that there was a substantial basis for the establishment of the Calistoga viticultural area. At the same time, while distinctive from surrounding areas, the Calistoga area nevertheless retains common characteristics with the Napa Valley appellation. We also noted that, consistent with previous practice, we had considered alternative names as a means of resolving conflicts between existing labels and the ''Calistoga'' viticultural area name. For example, the ''Oak Knoll District of Napa Valley'' viticultural area (T.D. TTB–9, 69 FR 8562) and the ''Diamond Mountain District'' viticultural area (T.D. ATF–456, 66 FR 29698) were established after resolving such conflicts, resulting in viticultural area names that were modifications of those originally proposed by the petitioners. The petition to establish the ''Oak Knoll District of Napa Valley'' viticultural area originally proposed the name ''Oak Knoll District''. The petition to establish the ''Diamond Mountain District'' viticultural area originally proposed the name ''Diamond Mountain'' for the viticultural area. In these and similar cases, TTB or its predecessor agency found that name evidence supported the use of the modified names, that the modified names were associated with the proposed viticultural area boundaries, and that their use reduced potential consumer confusion with long-standing existing labels. In the cases of Oak Knoll District of Napa Valley and Diamond Mountain District, the petitioners also agreed to the modifications of the viticultural area names.

Notice No. 77 explained that, in the case at hand, the petitioners and commenters to Notice No. 36 did not suggest any modification to the proposed name that would resolve conflicts between existing brand names and the ''Calistoga'' viticultural area name. (We also note that the evidence submitted with the original petition did include historical information that the term ''District'' was associated with the Calistoga area. Nevertheless, while not determinative of the appropriateness of the name, the petitioner did not believe that a modifier in the name such as ''district'' was appropriate.) Moreover, TTB had not found any potential name modifications that would be acceptable alternative names for the proposed ''Calistoga'' viticultural area. TTB had carefully considered the evidence submitted in support of the Calistoga viticultural area petition and had concluded that the term ''Calistoga'' alone is a specific, not generic, descriptive name that is clearly associated with Napa Valley viticulture. Accordingly, TTB acknowledged in Notice No. 77 that the term ''Calistoga'' alone would have viticultural significance. Therefore, under § 4.39(i), even if the name of the viticultural area were ''Calistoga District,'' a wine containing the term ''Calistoga'' in the brand name would still have to meet the appellation of origin requirements for the viticultural area (unless the brand name were subject to the exception in § 4.39(i)(2)).

In Notice No. 77, we stated that the evidence submitted by the petitioners indicates that designation of the Calistoga viticultural area would be in conformity with applicable law and regulations, and that a delay in the approval of the ''Calistoga'' viticultural area, as suggested by Calistoga Partners, would not be an appropriate or responsive resolution. After noting that the Calistoga case and cases with similar factual bases involve a fundamental conflict between two otherwise valid and appropriate TTB administrative actions, that is, the approval of labels by TTB through the issuance of certificates of label approval (COLAs) and the subsequent approval of a petitioned-for AVA, we stated:

> However, TTB also believes that Calistoga Partners has demonstrated a legitimate interest in not losing the ability to continue to use its long-held Calistoga Cellars brand name on its wines in the same way it has been using this name. We believe it is desirable to find a solution that will address the legitimate interests of both the Calistoga petitioners, who have an interest in gaining formal recognition of a viticulturally significant area and name, and vintners who have an interest in retaining the use of long-held brand names. We also believe, as a fundamental tenet of administrative practice, that it is preferable to avoid, whenever possible, a situation in which one otherwise proper administrative action (issuance of a certificate of label approval in this case) is restricted by a subsequent, valid administrative action (establishment of a viticultural area). And perhaps more importantly, where a conflict arises between a proposed AVA name and an established brand name, we do not believe that, in the context of the labeling provisions of the FAA Act, it is an appropriate government role to make choices between competing commercial interests, if such choices can be avoided.

As a result, we proposed regulatory text that would address the concerns of Calistoga Partners, L.P., and its continued use of the brand name ''Calistoga Cellars.'' Specifically, the proposal would allow for the continued use of a brand name containing the word ''Calistoga'' on a label for wine not meeting the appellation of origin requirements of 27 CFR 4.25 for the established Calistoga viticultural area if (1) the appropriate TTB officer finds that the brand name has been in actual commercial use for a significant period of time under one or more existing certificates of label approval that were issued under 27 CFR part 4 before March 31, 2005; and (2) the wine is labeled with information that the appropriate TTB officer finds to be sufficient to dispel the impression that the use of ''Calistoga'' in the brand name conforms to the appellation of origin requirements of 27 CFR 4.25. The notice noted that the proposed grandfather provision would not apply to a brand name that was first used in a certificate of label approval issued on or after March 31, 2005, the date that Notice No. 36 was published in the **Federal Register** originally proposing the establishment of the Calistoga viticultural area. This ''grandfather'' protection as proposed would not extend to the use of the name ''Calistoga Estate'' because that name was first submitted to TTB in connection with a label approval in July 2005, that is, after publication in the **Federal Register** of Notice No. 36.

In Notice No. 77 we invited comments on the ''grandfather'' provision, on the period of time that a label should be in actual commercial use for that use to be deemed ''significant,'' on the type of dispelling information that would be sufficient to prevent consumers from being misled as to the origin of the grapes used to produce the wine, on the appropriate type size and location on the wine label of such dispelling information, and on other alternatives.

The comment period for Notice No. 77 was originally scheduled to end on December 20, 2007. TTB received multiple requests to extend the comment period. In consideration of the requests and in light of the impact that

the approval of the proposed viticultural area and grandfather provision would have on wine labels, we published Notice No. 79 on December 17, 2007 (72 FR 71289), extending the comment period through March 20, 2008.

IV. Overview of Comments Received in Response to Notice No. 77

TTB received over 1,350 comments in response to Notice No. 77. Of these, approximately 1,160 were variations of form letters and postcards, submitted by mail and e-mail. The remaining written comments were received from individuals, wine consumers, wine distributors, winegrape growers, wineries, interest groups, business and trade organizations, and local, State and Federal Government representatives. Nearly all of these comments focused on the proposed grandfather provision for some labels and the ''dispelling'' information statement (referred to by many as the ''disclaimer'') that was proposed as a condition for use of the grandfather provision.

A number of the comments we received in response to Notice No. 77 also included commentary on Notice No. 78, which also was published in the **Federal Register** (72 FR 65261) on November 20, 2007. Notice No. 78 primarily involved proposed amendments to the TTB regulations regarding the establishment of viticultural areas in general, including a new grandfather concept for § 4.39(i). Comments that relate to proposals in Notice No. 78 are outside the scope of this rulemaking and will be addressed in a separate rulemaking action specific to Notice No. 78.

During the public comment period for Notice No. 77, TTB also met with attorneys representing Calistoga Cellars at their request. TTB included a summary of that meeting with the comments we received on Notice No. 77 that are posted on the Regulations.gov Web site (*http://www.regulations.gov*), and the points raised on behalf of Calistoga Cellars in that meeting are included where applicable in the following discussion.

The following discussion focuses on the commenters' positions on the establishment of the Calistoga American viticultural area (AVA) as a general proposition and on the grandfather provision in the proposed regulatory text (referred to herein as the ''Notice No. 77 grandfather provision''). Some commenter totals are given as approximations, because some commenters might fall within more than one of these general categories. A more detailed discussion of the comments on these two issues follows this category breakdown discussion.

- *Form letters and postcards.* As mentioned above, we received over 1,160 comments that were variations of form letters and postcards, nearly all of which were submitted through a group called ''Stand Up for the Little Guy,'' an interest group supporting Calistoga Cellars. The form letter asks TTB to ''sustain TTB Notice #77'' as it ''strikes a balance between the desire for a regional competitive advantage by designating the new Calistoga AVA and the due process right of a small winery.'' It states that ''Calistoga Cellars has spent over 10 years building a successful brand with customers throughout the country,'' that the winery has ''already agreed to more stringent labeling language,'' and that it is ''wrong for large, corporate wineries to use the AVA process to threaten the livelihood of a small winery such as Calistoga Cellars.'' The form postcard language is similar to that of the letter.
- *Wineries and wine cellars.* We received approximately 60 nonform-letter comments from representatives of wineries and wine cellars (other than the petitioner and representatives of Calistoga Cellars and Calistoga Estate). All of these comments opposed the proposals set forth in Notice No. 77, without distinguishing between the establishment issue and the grandfather issue. The majority of these comments argued that allowing geographic brand names to appear on labels of wine that do not comply with the sourcing requirements for the use of that viticultural area on the label will mislead and confuse consumers, and will undermine the integrity of the viticultural area. Many of these comments also noted that a disclaimer on a back label of a wine will not dispel consumer misperception of the origin of the wine. Several of the commenters suggest that the affected wineries should have known better than to have selected geographic brand names, like Calistoga, and that the proposal serves to harm those in the industry who have played by the rules when selecting their brand names.
- *Business interests and trade groups.* We received approximately 25 comments from interest groups and wine trade organizations, including the Calistoga Chamber of Commerce, the Napa Chamber of Commerce, Napa Valley Vintners, the Wine Institute, Sonoma County Vintners, Oregon Winegrowers Association, Appellations St. Helena, Family Winemakers of California, Napa County Farm Bureau, Winegrowers of Napa Valley, Lodi District Grape Growers Association, Wine America, California Farm Bureau Federation, Paso Robles AVA Committee, California Association of Winegrape Growers, Washington Wine Institute, Walla Walla Valley Wine Alliance, Stags Leap District Winegrowers Association, Santa Cruz Mountains Winegrowers Association, and the Washington Wine Group (self-described as a public agency ''empowered to speak for the Washington wine industry''). Many of these groups explicitly or implicitly supported the establishment of the Calistoga AVA in their comments, although all of the comments from these groups also expressed opposition to Notice No. 77. Many argued that the Notice No. 77 grandfather provision would have the effect of confusing and misleading consumers and undermining the integrity of the AVA system and the global competitiveness of American wines. Napa Valley Vintners (NVV) suggests that existing labels using the term ''Calistoga'' in the brand name should be prohibited from continued use because, along with being misleading, they were ''mistakenly issued.'' In addition, the NVV states that the proposed grandfathering of ''Calistoga'' brand names is incompatible with U.S. international obligations pursuant to Article 23 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).
- *Members of Congress.* We received a number of letters from members of the United States Congress. Several forwarded letters from constituents supporting Notice No. 77 (constituents included owners and investors in Calistoga Cellars). One Senator voiced support for Notice No. 77, expressing concern that ''a large wine industry group could use the AVA process to threaten the livelihood and survival of one vineyard,'' and asking that ''full and fair consideration'' be given to the concerns raised by Calistoga Cellars. Similar views were expressed in letters submitted by other Members of Congress. Another Senator also wrote on behalf of Calistoga Cellars, stating that, while he recognized the legitimate needs of consumers to better identify wines they purchase and vintners' desires to better describe their wines' origins, he encouraged TTB to ''continue to fully take into account businesses like Calistoga Cellars, which have made significant commercial investments over a period of time.''

One Senator submitted four letters in opposition to Notice No. 77. In referencing both Notice Nos. 77 and 78, the Senator stated that ''the changes being proposed do not improve the identification and labeling requirement

of wine products nor do they protect the consumer.'' The Senator further stated the proposed rules are ''contrary to U.S. international obligations and out of step with international wine industry standards for recognition of wine regions'', and that the grandfather provision in Notice No. 77 does not comply with the regulatory standards of the AVA system for grape content and geographic origin. TTB also received a letter signed by 61 members of the United States Congress expressing support for the existing AVA regulations and ''grave concern'' over Notice Nos. 77 and 78, ''which would significantly and detrimentally alter the American Viticultural Area (AVA) system.'' Two of the cosigners subsequently submitted a separate letter expressing the same viewpoint.

• *State and local governments.* We received comments from five State and local government representatives. A California State Senator submitted a resolution passed unanimously by the California State Legislature requesting TTB to withdraw Notice Nos. 77 and 78 and to move forward with the ''uncompromised recognition'' of the Calistoga AVA as originally petitioned for. The Mayor of the City of Paso Robles wrote in opposition to the Notice No. 77 grandfather provision, as did the City Manager for the City of Calistoga, the Napa County Agricultural Commissioner, and the Chair of the Napa County Board of Supervisors, who also expressed support for the establishment of the petitioned-for Calistoga AVA. The comment from the Napa County Board of Supervisors included a resolution passed by that body endorsing the Calistoga AVA petition and objecting to the Notice No. 77 proposals. These State and local government commenters raised concerns over potential negative economic consequences of the proposal, misleading and deceptive labels, diluting public confidence in domestic wine products, potential conflicts with the provisions of international agreements and with trademark laws, the integrity of the American wine industry domestically and internationally, and the devaluing of the Calistoga name.

• *Other businesses.* Approximately twenty comments were received from submitters identifying themselves in occupations relating to wine publishing and education, hotel operations, and wine importation, marketing, promotion, retail sales and distribution. Others identified themselves with Napa area businesses, such as the Napa Community Bank and Chardonnay Golf Club. One comment was received from Compliance Service of America, whose services include the preparation and filing of AVA petitions. With the exception of the latter, all of these commenters oppose the provisions of Notice No. 77. Generally, these commenters cited concerns about misleading wine labels that confuse consumers and about disclaimers hidden on the back labels that would not be read by a consumer before purchase at retail, from a wine list in a restaurant, or when using the internet. Some argued that such labels will undermine the integrity of American wine and the credibility of the AVA system. The comment from Compliance Service of America supports all of the proposals set forth in Notice No. 77 and cites examples of how conflicts between viticultural area names and brand names may legitimately arise.

• *Calistoga Cellars.* Five comments were submitted by representatives of Calistoga Cellars. The general partners of Calistoga Cellars provided specific information about that winery's operations, similar to information submitted in response to Notice No. 36 described above, including a list of existing certificates of label approval, specific sourcing information for grapes used in Calistoga Cellars wine, and an explanation of the ''impediments to sourcing grapes in the proposed Calistoga AVA.'' One comment reiterated the winery's position that it would be unable to find grapes of appropriate quality and quantity for its winery operations. For example, they asserted that the winery has found no source of Sauvignon Blanc grapes, Zinfandel grapes, or Cabernet Sauvignon grapes in the Calistoga viticultural area equal to or superior to its current sources. Further, they stated that, if required to source grapes only from the Calistoga AVA, the winery would suffer a ''devastating financial impact'' and the quality of its wines would suffer. According to that letter, Calistoga Cellars sold approximately 10,000 cases of wine in 2006 and 2007, an increase from approximately 8,000 cases in 2005. Further, Calistoga Cellars had continued to build its national brand by increasing the number of States into which it was distributed to 35.

• *Calistoga Estate.* Eight comments were received from submitters describing themselves as owners, investors, partners, or attorneys of Calistoga Estate. One commenter specifically opposed the establishment of the Calistoga viticultural area. Others opposed excluding Calistoga Estate from the Notice No. 77 grandfather provision, pointing out that the grandfather provision applies only to labels in commercial use as of March 31, 2005, whereas Calistoga Estate received its first label approval in July 2005. They argued that the proposed provisions would be arbitrary and capricious, serve no public policy purpose, and constitute an improper taking of their property (brand). Further, the commenters asserted that the winery has spent considerable time and money establishing the brand name (distributing in 10 States, adding 3 more in January 2008), and that for the winery to ''have to change our name at this time would be devastating.'' They asserted that the Notice No. 77 proposals, if adopted, would also harm the wholesalers, brokers, retailers, and food establishments handling Calistoga Estate wines. They suggested that TTB should have notified the winery about the potential AVA name conflict when the Calistoga Estate labels were submitted for approval.

• *The petitioner.* The original petitioner for the Calistoga AVA, submitted two comments, both opposing the Notice No. 77 grandfather provision. He argued that the provision would ''greatly weaken American consumers' confidence in American wine labels,'' that the proposed regulations would conflict with international agreements and may cause the European Union and Japan to prohibit importation of wine from the United States bearing a viticultural area designation, and that the proposals conflict with current TTB publications and regulations. He also argued that the proposals would benefit ''illegitimate economic interests of one owner of a misdescriptive Calistoga brand name over the legitimate economic interests of the wine industry for the entire Calistoga region and the veracity of the Calistoga name.''

• *Concerned citizens and ''unaffiliated'' commenters.* The remaining commenters, approximately 50, either described themselves as ''concerned citizens'' or did not designate a particular affiliation. One of these comments supported the position of Calistoga Estate and asked that the date by which labels could be considered for the Notice No. 77 grandfather provision be changed to accommodate that winery's labels. Seven of the approximately 50 comments supported the position of Calistoga Cellars, most citing concern over abuses of the policy process by ''large corporations'' and anticompetitive practices that harm ''small, independent businesses,'' while one argued that not sustaining Notice No. 77 would ''constitute an ex post

facto taking of Calistoga Cellars' name without just compensation.'' The remaining comments opposed Notice No. 77, suggesting that it would allow misleading labels, would violate the intent of, and would be contradictory to, the stated objectives of the AVA process and would support deceptive brand names. Many commenters opposed a provision they describe as contrary to ''truth in labeling,'' and considered disclaimers on back labels to be ineffectual in conveying information to consumers buying wine at a restaurant, at retail, or through the Internet.

V. Comments on the Establishment of the Calistoga Viticultural Area

Twenty-eight commenters stated support for the establishment of the Calistoga viticultural area. Many others indirectly expressed support for or opposition to the establishment of the AVA, conditioned on other issues, such as the Notice No. 77 grandfather provision. A few commenters who supported the establishment of the viticultural area said that it would enhance the distinct character of the Calistoga region and protect consumers who rely on the meaning and value of the Calistoga name. A representative of Jericho Canyon Vineyard wrote that the Calistoga appellation would enable consumers to ''identify characteristics that make Calistoga wines unique.'' A Jax Vineyards representative stated that ''[w]hen we purchased our vineyard in 1996, we specifically chose Calistoga for its unique weather conditions and specific soil content ideal for Cabernet Sauvignon,'' and that the proposed Calistoga viticultural area is distinct from the viticultural area next to it. That commenter argued that she should be able to promote the fact that her wines come from Calistoga. Napa Valley Vintners also provided numerous references in support of the petitioners' evidence showing that the Calistoga area is recognized as an area of viticultural significance and has been associated with the ''Calistoga'' name.

Three commenters offered several arguments against the establishment of the proposed viticultural area, including questioning the proposed name and boundaries. Two commenters suggested that Calistoga is not known for wine, but rather for tourism, hot springs, and mineral water. One asserted that there ''has not been any clear connection with that name and wine produced in the Napa Valley, or for that matter in and near the city of Calistoga.'' Another opined that ''suggesting an AVA is confusing in that Calistoga is not the major wine 'player' that is suggested by an AVA designation.'' Two commenters expressed opposition to the proposed viticultural area boundaries because of the relationship between those boundaries and political (*e.g.,* county or city) boundaries in the area. One commenter specifically objected to the use of the county line as the proposed AVA boundary ''as if the characteristics of the soil and climate respected political divisions''. This commenter argued that those with Calistoga as their legal address should be allowed to use the name on their wines.

Two commenters, one an investor in the Calistoga Estate winery and the other an attorney writing on behalf of that winery, questioned the proposed viticultural area boundaries because the boundaries do not include all of the city of Calistoga. The latter commenter asserted that, because the proposed viticultural area boundaries and the city boundaries do not perfectly correspond, using the ''Calistoga'' name for the viticultural area would cause confusion between that Calistoga viticultural area and the city of Calistoga. He stated that, ''because many consumers know the city of Calistoga, they almost certainly will believe that wine bearing a Calistoga AVA originated in the city of Calistoga.'' In addition, he pointed out that some parts of the city of Calistoga are within a different viticultural area, the Diamond Mountain District viticultural area and that, in some cases, ''consumers would confront wines that bear Calistoga, California as the mandatory name and address information on the label, but confusingly bear the Diamond Mountain District AVA on the label.'' Additionally, some wineries that are not within the Calistoga city limits would be in the Calistoga viticultural area. This commenter also argued that the proposed AVA would include areas even outside of the city of Calistoga's ''unincorporated Planning Area,'' which would ''sweep in far more area than the city itself,'' and that consumers could be confused by areas in the AVA that are outside of the planning area. The commenter suggested for the reasons above that the name ''Calistoga'' for the viticultural area would be misleading unless further qualified, for example, by modifying the name to ''Calistoga District.''

Another commenter stated that TTB should expand the boundaries of the proposed viticultural area to accommodate the vineyards used by Calistoga Cellars.

TTB Response

After carefully considering the evidence submitted in support of the petition and the comments received in response to Notice No. 77, TTB continues to believe that the evidence submitted supports the establishment of the ''Calistoga'' viticultural area, with the boundaries as the petition describes and as set forth in the proposed regulatory text. We find that there is sufficient evidence that the proposed viticultural area boundaries are associated with both a name and a set of geographical features (climate, soils, elevation, and physical features) that are common to the designated region and that distinguish it from other areas. None of the commenters opposing the proposed boundaries has submitted evidence to undermine this finding. Much of the Calistoga boundary reflects the boundaries of existing AVAs, and the record in those rulemakings supports those boundaries, including the political boundary of the county line to which one commenter objected. Moreover, none of these commenters has specifically proposed new, more appropriate boundaries, other than to say that the boundaries should or should not reflect political boundaries or that the boundaries should include other vineyards or wineries. None of these commenters has provided evidence to show that the viticultural area geographic features coincide with, or vary from, the relevant political boundaries such as a county line. We have in the past considered, and will continue to consider, any petition to amend the boundaries of an established viticultural area, so long as that petition contains sufficient name and geographical features evidence to support such an amendment. The points made by these commenters do not meet this evidentiary standard and, therefore, we find no basis at this time for modifying the boundary proposed for the Calistoga viticultural area.

We disagree with those commenters who suggested that there is, or should be, a relationship between the legal address of a business, in this case a winery, and the viticultural area designation of a wine. Under the TTB regulations at 27 CFR 4.32(b)(1) and 4.35(a) there is only one specification for name and address that is mandatory on a label for American wine: The words ''bottled by'' or ''packed by'' followed by the name of the packer or bottler of the wine and the place where the wine is bottled or packed. (Wine labels may also bear, as optional statements under certain conditions, address information corresponding to the place the wine was produced, blended, or cellared.) Therefore, it is not uncommon or inappropriate for a wine label that bears a viticultural area name

to also bear address information that does not correspond to that viticultural area. The same result might arise from wines that bear a county or state name as an appellation of origin due to the fact the product may be bottled outside of the county or State.

With regard to the viticultural area name, the evidence clearly establishes that ''Calistoga'' is a name that is locally and regionally known and that the term ''Calistoga'' by itself has been associated historically with viticulture, specifically Napa Valley viticulture. As noted above, in the preamble to Notice No. 77, we discussed in detail possible modifications to the name of the viticultural area, including the addition of the word ''District'' (making the viticultural area name ''Calistoga District''). The evidence submitted with the viticultural area petition as outlined earlier in this final rule under ''Name Evidence'' supported a finding that the term ''Calistoga'' alone is a specific reference to an area associated with viticulture and therefore would be a term of viticultural significance regardless of other words that might be included in the viticultural area name such as ''District''. As to whether the name was underinclusive by not including other areas also known by the term Calistoga, such as all of the city of Calistoga, TTB's establishment of an AVA does not mean that there can be no area outside of the established AVA boundaries also known by that term. This is consistent with the past practice of TTB and its predecessor in establishing AVAs (*e.g.,* Snake River Valley, T.D. TTB–59, 72 FR.10602 (Mar. 9, 2007) and Niagara Escarpment, T.D. TTB–33, 70 FR 53300 (Sept. 8, 2005)). In response to the comment that the AVA includes areas not included in the ''unincorporated Planning Area,'' TTB does not believe that a map designed to reflect planning authority defines the extent of this area's name. Furthermore, the commenter was satisfied with calling the area ''Calistoga District,'' which suggests that the term ''Calistoga'' in connection with the proposed area was acceptable.

VI. Comments on the Notice No. 77 Grandfather Provision

Whether Another Grandfather Provision Is Appropriate

As noted earlier, TTB received approximately 1,160 variations of a form letter and postcard supporting the Notice No. 77 grandfather provision. The vast majority of these comments, along with another 15 written comments supporting the position of Calistoga Cellars, focused primarily on the expected effect of the grandfather provision (that is, the protection of a ''small winery'' or ''a small investor'' or ''individual business owners'' in the face of actions by ''large, corporate wineries'' or ''the large wine industry group, the Napa Valley Vintners'') and the hardship that the winery would otherwise face.

As noted above, several Members of Congress commented in support of Notice No. 77. The comment of one Senator provided a concise summary of many of the comments in favor of Notice No. 77, saying that it ''struck the appropriate balance'' and that, without the grandfather provision, the establishment of the Calistoga AVA ''would have a devastating impact on Calistoga Cellars, forcing this small company to lose its investment and the brand name the company spent over 10 years building.'' One Senator expressed concern about opposition to the grandfather provision by Napa Valley Vintners, stating that he was ''troubled that a large wine industry group could use the AVA process to threaten the livelihood and survival of one small vineyard'' and that ''the AVA process should not be used as a tool to eliminate competition in the marketplace.''

A comment submitted by one of the general partners of Calistoga Cellars further argued that the existing grandfather provision of 27 CFR 4.39(i), which applies to brand names in commercial use prior to July 7, 1986, is ''fundamentally unfair'' because it ''requires all owners of brand names containing a geographical term of viticultural significance used under certificates of label approval approved after July 7, 1986 * * * to change their business plan, marketing strategy and grape sources immediately upon the creation of a new AVA incorporating such geographic term, no matter how long such * * * COLA has been in use.'' The commenter went on to state that a ''brand owner may have chosen a name without any knowledge of its (potential) geographic significance'' and that ''brand owners should have some assurance that their geographic brand name, perhaps used for years, will not be canceled by a newly created AVA.'' Finally, he argued that, if the Calistoga region were such a noted viticultural area for over 100 years, those concerned about protecting the use of its name would have filed a petition for establishment of the Calistoga viticultural area sooner. He stated that he believes the ''failure to file until 2005 should be taken into consideration when determining how pre-petition geographic brand names should be treated.''

Along the same lines, Compliance Service of America suggested that vintners commenting in opposition to the Notice No. 77 proposals may not realize that their own brand names hold the same potential for being limited by the creation of a viticultural area. The commenter gave as an example the Eola Hills viticultural area proposal, asserting that the winery that developed the viticultural significance of the region found that a petition had been submitted for the establishment of the viticultural area which would have caused the Eola Hills winery to lose the right to use its brand name on wines made with grapes sourced from outside the proposed viticultural area boundaries. The resolution was a modification of the proposed viticultural area name and of the term designated as viticulturally significant, which were agreed to by the petitioners and label holder. This commenter went on to note, with regard to the Calistoga viticultural area, that the ''history of the Calistoga name does not support the argument that it had so much viticultural significance that the equities favor the AVA name over the brand name.''

Out of the 184 nonform-letter comments, 110 specifically addressed the Notice No. 77 grandfather provision, 99 of which expressed opposition to it. Many of these commenters asserted that, because the TTB regulations have included a grandfather provision since 1986, at 27 CFR 4.39(i)(2), which prohibits the use of brand names on labels unless those labels were approved on certificates of label approval issued prior to July 7, 1986, Calistoga Cellars should have known better than to use a brand name containing a geographic name, should have been aware that they could lose the use of their brand name, and ''did not do their due diligence in choosing the name.'' One commenter, a winery owner, recalled attending numerous seminars and reading information regarding geographic brand names and, after ''doing his homework'' decided against using a geographic brand name for his winery. Another commenter stated that ''responsible vintners know the risk in choosing to name a winery after a township or geographic region (of potential conflict with future AVA designations) and the benefits (immediate brand recognition).''

Napa Valley Vintners (NVV) argued that TTB's approval of the labels bearing a ''Calistoga'' brand name was done so contrary to TTB guidance regarding geographic brand names appearing in the Beverage Alcohol Manual for Wine (BAM). NVV pointed out that the BAM

states that ''[i]f the brand name includes the name of a geographic area that actually exists and is described in at least two reference materials as a grape growing area, the wine cannot be labeled with such a brand name.'' The NVV included in its comment a number of references to the Calistoga area appearing in wine-related publications and, based upon those references, asserted that the COLAs issued for labels bearing the ''Calistoga'' brand names were mistakenly issued as Calistoga was a clearly established term of viticultural significance appearing in multiple reference sources at the time of the approval. Further, the NVV pointed to the TTB regulations in 27 CFR part 13 setting forth procedures by which specific COLAs may be revoked as the appropriate means for addressing labels that TTB may have erroneously approved.

TTB Response

As noted above, in the preamble of Notice No. 77 TTB set forth the reasons why we proposed the step of including a limited grandfather provision in the proposed regulatory text. We explained that we recognized in the Calistoga case a rare instance in which a conflict between approved COLAs and the approval of a petitioned-for AVA hinged upon a specific term of viticultural significance in such a way that an appropriate compromise between the affected parties regarding the term could not be reached. We believe that the comments that attempt to define the equities in this case by portraying the different parties as ''large'' or ''small'', or that describe the Notice No. 77 proposal as ''protecting'' one entity over another, raise points that are not germane to the fundamental issue that Notice No. 77 addressed.

The present rulemaking raised the question of what to do about viticultural area petitions that are received long after the issuance in 1986 of § 4.39(i) on the use of geographical brand names of viticultural significance where the petition proposes a name that results in a conflict with a brand name first used on an approved COLA not covered by the grandfather provision in § 4.39(i). Such a circumstance may occur for legitimate reasons because exact terms of viticultural significance are not always universally agreed upon, and relevant facts and issues regarding terms and areas of viticultural significance are not always brought forward until a petition is published for rulemaking. Notice No. 78 addressed this issue in general terms. In the present rulemaking, TTB has to resolve it in the context of the Calistoga name.

We do not agree that, in light of statements appearing in the BAM, the COLAs for labels bearing the ''Calistoga'' brand names were mistakenly issued. The BAM was published as guidance to assist the industry in understanding the pertinent regulatory provisions, in this case, those appearing at § 4.39(i)(3) pertinent to the use of geographic brand names on wine labels. As we have noted, that regulation provides that a name has viticultural significance when it is the name of a State or county (or the foreign equivalent), when approved as a viticultural area in accordance with the regulations in 27 CFR part 9, or by a foreign government, or when found to have viticultural significance by the appropriate TTB officer under § 4.39(i)(3). The regulations specifically provide discretion to the Bureau with regard to making such determinations. Regardless of whether TTB or its predecessor agency should have done so, the fact remains that, when labels containing the ''Calistoga Cellars'' brand name or the ''Calistoga Estate'' brand name were approved, no specific determination had been made by TTB that the name ''Calistoga'' was viticulturally significant.

In the past, TTB and its predecessor agency looked at the proposed names of the AVAs to determine whether they would mislead the consumer taking into account existing brand names (see Stags Leap, Spring Mountain, Diamond Mountain, Oak Knoll, *etc.*). Where the proposed AVA name did not lead to a likelihood of confusion, for example because the proposed name included an additional word such as ''District'' or ''Hills'' that distinguished it from another identical name (such as a brand name), the name was approved. Alternatively, where the proposed name would likely lead to confusion, the assessment turned to alternative names proposed by the petitioner or commenters. In the present rulemaking, neither situation is present. The proposed name Calistoga would conflict with the existing brand names and a satisfactory alternative name has not been proposed by the petitioner or commenters nor found by TTB.

Notwithstanding the considerations noted above, we have concluded for the reasons set forth below that the adoption of a specific, limited grandfather provision would not be appropriate in this case.

We believe that, consistent with the purpose behind the labeling provisions of the FAA Act and existing regulations, in particular § 4.39(i) which would preclude the use of a brand name that does not conform to the requirements for use of the AVA name, a change that would permanently affect the application of § 4.39(i) would not be warranted in this case. Moreover, a specific grandfather provision for one winery is an approach that TTB and its predecessor have not used in the past. We believe in this matter that a label with the proposed disclaimer may not provide a consumer with adequate information as to the identity of the product but rather may result in the consumer being misled as to the true origin of the grapes used to produce the wine. Section 4.39(i) has been in effect for over 20 years, and its application and effect have been well understood over that period of time. That is, when it cannot be otherwise avoided the government may make a choice between competing commercial interests by requiring existing labels' compliance with regulations establishing a new AVA.

Furthermore, the use of a grandfather provision would result in the application of multiple standards for the use of one name on wine labels, leading to potential consumer confusion and thus potentially frustrating the consumer protection purpose of the FAA Act labeling provisions. In the present case, we conclude that it is preferable as a matter of consumer protection for ''Calistoga'' to have only one meaning and association for viticultural area purposes. Accordingly, in this final rule we are not adopting a grandfather provision in the new § 9.209 text, and, as a consequence of this decision we are not adopting the proposed conforming amendment to § 4.39(i).

Whether the Proposed Action Would Result in a Taking of Property

One commenter suggested, in the context of Calistoga Estate, that the proposal would take away the label and that therefore the brand, as property, would be taken away by the government.

TTB Response

We do not agree that applying the regulations set forth at § 4.39(i) constitutes a ''taking'' of property. TTB and its predecessor agency have long held that the certificate of label approval was never intended to convey any type of proprietary interest to the certificate holder. Indeed a statement to that effect was made in T.D. ATF–406 published in the **Federal Register** (64 FR 2122) on January 13, 1999, which set forth the procedures by which specific COLAs may be revoked. Moreover, the form required for use in applying for label approval, TTB F 5100.31, Application

for and Certification/Exemption of Label/Bottle Approval, states, ''This certificate does not constitute trademark protection.'' In addition, we note that affected wineries may continue to use the labels in question if they configure their wines so that at least 85 percent of the wine is produced from grapes grown within the Calistoga viticultural area.

We note that a ''taking'' may occur under the Fifth Amendment, inter alia, when the government restricts some of the owners' uses of private property even though the owner is left with a substantial economic use. Consistent with the Supreme Court's decision in *Penn Central Transp. Co.* v. *New York City,* 438 U.S. 104 (1978), three considerations may be applied in this situation to conclude that the government's action is not a taking. First, the nature of the government action to protect consumers from misleading labels and to prevent new conflicting brand names from coming into use after the establishment of a viticultural area is sound public policy. The brand names ''Calistoga Cellars'' and ''Calistoga Estate'' may continue to be used but simply must be used in a manner that conforms to the requirements of § 4.39(i) to ensure that consumers are not misled. That is, these brand names must be used in a truthful manner. See *Bronco Wine Co.* v. *Jolly,* 129 Cal.App.4th 988, 29 Cal.Rptr.3d 462, (Cal. Ct. App. 2005), *review denied,* 2005 Cal LEXIS 9470 (Aug. 24, 2005) and *cert. denied,* 546 U.S. 1150 (2006). Second, the negative economic impact on the affected brand names is mitigated by the fact that the government action leaves significant value in the brand name when it is used with grapes from Calistoga, or when the brand name is sold to a winery for use on wine eligible for the Calistoga viticultural name, and the brand name also may gain enhanced value from the new viticultural area designation. See *Andrus* v. *Allard,* 444 U.S. 51 (1979). Finally, the investment-back expectations are not derogated because all affected brand names came into use after publication of the current rule in § 4.39(i) and the approval of COLAs by TTB or its predecessor did not imply that the brand name could be used in every situation.

Whether Affected Wineries Should Be Allowed a Time Period To Phase Out Noncompliant Labels

NVV asserted that it would be reasonable to allow Calistoga Cellars to phase out, over a 3-year period, its use of the Calistoga Cellars brand name on wine not complying with the appellation of origin requirements for the Calistoga viticultural area. NVV pointed out that a similar sunset principle was provided for varietal names and for the implementation of the original appellation of origin rules in T.D. ATF–53, 43 FR 37672 (Aug. 23, 1978). An attorney commenting on behalf of Calistoga Estate also argued that, should TTB decide to establish an AVA for the Calistoga area that does not permit Calistoga Estate to continue using the Calistoga Estate brand name on wine produced from grapes purchased elsewhere in the Napa Valley, TTB should provide Calistoga Estate a minimum 3-year phase-out period to allow the establishment of a new brand. The commenter argued that a minimum 3-year transition period would allow Calistoga Estate to ''fully inform wholesalers, brokers, control state buyers, retailers and consumers about its new name, allowing it to transition the goodwill now associated with the Calistoga Estate wine to another brand name.'' In addition, the commenter cited other factors in support of a 3-year transition period, including the need to use up existing label stocks, the need to design new labels and receive TTB approval of those labels, and the need to test consumer acceptance of any new brand name. The commenter cited other TTB rulemaking actions that allowed for a 3-year transition period.

TTB Response

We agree with the comments received, and accordingly we believe that a 3-year use-up period would be sufficient and appropriate to transition the affected brand labels without unnecessary disruptions or economic costs. Therefore, we are providing for a 3-year transition period for the affected brand labels. As pointed out in the comments, there is agency precedent for such a transition period. In addition to the commenter's reference to the 5-year transition period for the original appellation of origin rules, among others, TTB provided a 1-year transition period for brand labels affected by the change in the name of the Santa Rita Hills AVA to the Sta. Rita Hills AVA, T.D. TTB–37, 70 FR 72710 (Dec. 7, 2005). We are providing this 3-year transition period to allow the use-up of existing label stocks, to provide time for the design of new labels, to submit labels and receive label approvals from TTB, and to allow each affected brand label holder the opportunity to consider other changes required of its business model in light of this rulemaking, including whether to begin sourcing 85 percent or more of its grapes from the new Calistoga viticultural area in order to continue to use its brand name or to transition to a new brand name.

TTB Finding

After careful consideration of the evidence submitted in support of the petition and the comments received, for the reasons set forth above, TTB finds that the evidence submitted supports the establishment of the proposed viticultural area. The petitioners submitted sufficient evidence of the viticultural distinctiveness of the Calistoga area, and the comments did not include contradictory evidence. TTB also finds that ''Calistoga'' is the most appropriate name for the area. The evidence clearly shows that ''Calistoga'' is the name by which the area is locally and regionally known and that the term ''Calistoga'' by itself has been associated historically with viticulture, specifically Napa Valley viticulture.

TTB finds that the evidence submitted by the petitioners establishes that designation of the Calistoga viticultural area is in conformity with applicable law and regulations. Therefore, under the authority of the Federal Alcohol Administration Act and part 4 of our regulations, we establish the ''Calistoga'' viticultural area in Napa County, California, effective 30 days from the publication date of this document with a 3-year transition period for the use of existing approved COLAs for labels containing ''Calistoga'' in the brand name on wine that does not qualify for the ''Calistoga'' designation.

Boundary Description

See the narrative boundary description of the viticultural area in the regulatory text published at the end of this final rule.

Maps

The maps for determining the boundary of the viticultural area are listed below in the regulatory text.

Impact on Current Wine Labels

Part 4 of the TTB regulations prohibits any label reference on a wine that indicates or implies an origin other than the wine's true place of origin. With the establishment of this viticultural area and its inclusion in part 9 of the TTB regulations, its name, ''Calistoga,'' is recognized under 27 CFR 4.39(i)(3) as a name of viticultural significance. The text of the new regulation clarifies this point. Consequently, wine bottlers using ''Calistoga'' in a brand name, including a trademark, or in another label reference as to the origin of the wine, must ensure that the product is eligible to use the viticultural area's name as an appellation of origin or meets the

requirements for application of the existing § 4.39(i) ''grandfather'' provision.

Regulatory Flexibility Act

We certify that this regulation will not have a significant economic impact on a substantial number of small entities. This rule would impact only a small number of existing entities. In addition, this regulation imposes no new reporting, recordkeeping, or other administrative requirement. Any benefit derived from the use of a viticultural area name is the result of a proprietor's efforts and consumer acceptance of wines from that area. While we received comments suggesting that two small wineries might be adversely impacted by the adoption of the Calistoga AVA without some sort of relief, the final rule provides such relief in the form of a three-year period to allow the use-up of existing labels, to transition to new labels, or to consider other options for changing business practices to comply with the regulatory provisions. A search of the COLA database disclosed that several other brand names incorporating the name ''Calistoga'' appear on approved labels and the holders of those brand names did not comment on the proposal. It may be that these brand names are used on wines that are eligible for Calistoga AVA requirements or otherwise comply with § 4.39(i). In any case, to the extent those names are limited by the establishment of the Calistoga AVA, they are eligible for the continued use allowed under the transition period. Therefore, no regulatory flexibility analysis is required.

Executive Order 12866

This rule is not a significant regulatory action as defined by Executive Order 12866 (58 FR 51735). Therefore, it requires no regulatory assessment.

List of Subjects in 27 CFR Part 9

Wine.

The Regulatory Amendment

■ For the reasons discussed in the preamble, we amend 27 CFR, chapter 1, part 9, as follows:

PART 9—AMERICAN VITICULTURAL AREAS

■ 1. The authority citation for part 9 continues to read as follows:

Authority: 27 U.S.C. 205.

Subpart C—Approved American Viticultural Areas

■ 2. Subpart C is amended by adding § 9.209 to read as follows:

§ 9.209 Calistoga.

(a) *Name.* The name of the viticultural area described in this section is ''Calistoga''. For purposes of part 4 of this chapter, ''Calistoga'' is a term of viticultural significance.

(b) *Approved maps.* The appropriate maps used to determine the boundary of the Calistoga viticultural area are four United States Geological Survey 1:24,000 scale topographic quadrangle maps. They are titled:

(1) Mark West Springs, Calif. (1993);

(2) Calistoga, CA (1997);

(3) St. Helena, Calif. (1960, revised 1993); and

(4) Detert Reservoir, CA (1997).

(c) *Boundary.* The Calistoga viticultural area is located in northwestern Napa County, California. The boundary beginning point is on the Mark West Springs map at the point where the Napa-Sonoma county line intersects Petrified Forest Road in section 3, T8N/R7W. From this point, the boundary:

(1) Continues northeasterly along Petrified Forest Road approximately 1.9 miles to the road's intersection with the 400-foot contour line near the north bank of Cyrus Creek approximately 1,000 feet southwest of the intersection of Petrified Forest Road and State Route 128 on the Calistoga map;

(2) Proceeds generally east-southeast (after crossing Cyrus Creek) along the 400-foot contour line to its intersection with Ritchey Creek in section 16, T8N/R6W;

(3) Follows Ritchey Creek northeast approximately 0.3 mile to its intersection with State Route 29 at the 347-foot benchmark;

(4) Proceeds east-southeast along State Route 29 approximately 0.3 mile to its intersection with a light-duty road labeled Bale Lane;

(5) Follows Bale Lane northeast approximately 0.7 mile to its intersection with the Silverado Trail;

(6) Proceeds northwest along the Silverado Trail approximately 1,500 feet to its intersection with an unmarked driveway on the north side of the Silverado Trail near the 275-foot benchmark;

(7) Continues northeasterly along the driveway for 300 feet to its intersection with another driveway, and then continues north-northeast in a straight line to the 400-foot contour line;

(8) Follows the 400-foot contour line easterly approximately 0.7 miles to its intersection with an unimproved dirt road (an extension of a road known locally as the North Fork of Crystal Springs Road), which lies in the Carne Humana Land Grant approximately 1,400 feet southwest of the northwest corner of section 11, T8N/R6W on the St. Helena map;

(9) Continues northerly along the unimproved dirt road approximately 2,700 feet to its intersection with the 880-foot contour line in section 2, T8N/R6W;

(10) Follows the meandering 880-foot contour line northwesterly, crossing onto the Calistoga map in section 2, T8N/R6W, and continues along the 880-foot contour line through section 3, T8N/R6W, sections 34 and 35, T9N/R6W, (with a brief return to the St. Helena map in section 35), to the 880-contour line's intersection with Biter Creek in the northeast quadrant of section 34, T9N/R6W;

(11) Continues westerly along the meandering 880-foot contour line around Dutch Henry Canyon in section 28, T9N/R6W, and Simmons Canyon in section 29, T9N/R6W, to the contour line's first intersection with the R7W/R6W range line in section 30, T9N/R6W;

(12) Continues northerly along the meandering 880-foot contour line across the two forks of Horns Creek and through Hoisting Works Canyon in section 19, T9N/R6W, crossing between the Calistoga and Detert Reservoir maps, to the contour line's intersection with Garnett Creek in section 13, T9N/R7W, on the Detert Reservoir map;

(13) Continues westerly along the meandering 880-foot contour line, crossing between the Calistoga and Detert Reservoir maps in sections 13 and 14, T9N/R7W, and in the region labeled ''Mallacomes or Moristul y Plan de Agua Caliente,'' to the contour line's intersection with the Napa-Sonoma county line approximately 1.1 miles northeast of State Route 128 in the ''Mallacomes or Moristul y Plan de Agua Caliente'' region, T9N/R7W, of the Mark Springs West map; and

(14) Proceeds southerly along the Napa-Sonoma county line to the beginning point.

(d) *Transition Period.* A label containing the word ''Calistoga'' in the brand name approved prior to December 8, 2009 may not be used on wine bottled on or after December 10, 2012 if the wine does not conform to the standards for use of the label set forth in § 4.39(i) of this chapter.

Signed: December 1, 2009.

John J. Manfreda,

Administrator.

Approved: December 1, 2009.

Timothy E. Skud,

Deputy Assistant Secretary (Tax, Trade, and Tariff Policy).

[FR Doc. E9–29217 Filed 12–3–09; 4:15 pm]

BILLING CODE 4810–31–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2009–0764]

Drawbridge Operation Regulation; Gulf Intracoastal Waterway, Dunedin, FL

AGENCY: Coast Guard, DHS.

ACTION: Notice of temporary deviation from regulations.

SUMMARY: The Commander, Seventh Coast Guard District, has issued a temporary deviation from the regulation governing the operation of the Dunedin Causeway bridge across the Gulf Intracoastal Waterway, mile 141.9, at Dunedin, FL. The deviation is necessary to facilitate rehabilitation of the bascule leaves of the bridge. This deviation allows the bridge to conduct single leaf operations while repairs are conducted with a three hour notice for double leaf operations.

DATES: This deviation is effective from 7 a.m. on September 8, 2009 through 6 p.m. on February 28, 2010.

ADDRESSES: Documents mentioned in this preamble as being available in the docket are part of docket USCG–2009–0764 and are available online by going to *http://www.regulations.gov,* inserting USCG–2009–0764 in the ''Keyword'' box and then clicking ''Search''. They are also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or e-mail Mr. Gene Stratton, Bridge Branch, Seventh Coast Guard district; telephone 305–415–6740, e-mail *allen.e.stratton@uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION: Coastal Marine Construction, INC, on behalf of Pinellas County, FL, has requested a deviation to the regulations of the Dunedin Causeway bridge, mile 141.9, across the Gulf Intracoastal Waterway as required by 33 CFR 117.5: Except as otherwise authorized or required by this part, drawbridges must open promptly and fully for the passage of vessels when a request or signal to open is given in accordance with this subpart. To facilitate the repair of the bascule leaves, one leaf will be required to remain in the closed position upon signal from a vessel, except with a three hour notification for an opening requiring both leaves. This deviation effectively reduces the horizontal clearance of 91 feet by half for vessels requiring an opening. The Mean High Water clearance in the closed position remains 24 feet. Vessels not requiring an opening may pass at any time. This action will affect a limited number of vessels as the ability to use the full 91 foot horizontal clearance is available with a three hour notification. This action is necessary to allow Coastal Marine Construction, INC to conduct necessary repairs the bascule leaves safely and efficiently.

In accordance with 33 CFR 117.35(e), the drawbridge must return to its regular operating schedule immediately at the end of the designated time period. This deviation from the operating regulations is authorized under 33 CFR 117.35.

Dated: November 6, 2009.

Scott A. Buschman,

Captain, U.S. Coast Guard Commander, Seventh Coast Guard District, Acting.

[FR Doc. E9–29126 Filed 12–7–09; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2009–0989]

RIN 1625–AA00

Safety Zone; Chimes and Lights Fireworks Display, Port Orchard, WA

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone on the waters of Port Orchard, WA during the Chimes and Lights fireworks display. This action is necessary to provide for the safety of recreational and commercial boaters in the area during the fireworks show on December 5, 2009. Entry into, transit through, mooring, or anchoring within this safety zone is prohibited unless authorized by the Captain of the Port, Puget Sound or Designated Representative.

DATES: This rule is effective from 5 p.m. to 8 p.m., December 5, 2009.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket USCG–2009–0989 and are available online by going to *http://www.regulations.gov*, inserting USCG–2009–0989 in the ''Keyword'' box, and then clicking ''Search.'' They are also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary rule, call or e-mail ENS Ashley M. Wanzer, Sector Seattle Waterways Management Division, Coast Guard; telephone (206) 217–6175, e-mail *SectorSeattleWWM@uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Regulatory Information

The Coast Guard is issuing this temporary final rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because it is contrary to the public interest to delay the effective date of this rule. Delaying the effective date by first publishing an NPRM would be contrary to the safety zone's intended objective since immediate action is necessary to ensure the safety of vessels and spectators gathering in the vicinity of the fireworks launching barge and display sites. Hazards include premature detonations, dangerous detonations, dangerous projectiles and falling or burning debris. Additionally, the zone should have negligible impact on vessel transits due to the fact that vessels will be limited

from the area for only three hours and vessels can still transit in the majority of Puget Sound during the event. Accordingly, under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing an NPRM.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register** because immediate action is necessary to ensure the safety of vessels and spectators gathering in the vicinity of the fireworks launching barge and display sites. For this reason, following normal rulemaking procedures in this case would be impracticable and contrary to the public interest.

Background and Purpose

The Coast Guard is establishing a temporary safety zone to allow for a safe fireworks display. This event may result in a number of vessels congregating near fireworks launching barge and site. The safety zone is needed to protect watercraft and their occupants from safety hazards associated with fireworks displays. The Captain of the Port, Puget Sound may be assisted by other federal and local agencies in the enforcement of this safety zone.

Discussion of Rule

The Coast Guard is establishing a safety zone on the specified waters of Port Orchard, WA. The safety zone will encompass all waters of Sinclair Inlet extending out to a 500' radius from the fireworks launch site located north of the town of Port Orchard at Radar Site ''C'' at 47°32′45″ N, 122°38′02″ W (NAD 1983). This rule, for safety concerns, will control vessels and personnel movements in a safety zone. Entry into this zone is prohibited unless authorized by the Captain of the Port, Puget Sound or Designated Representative. The Captain of the Port, Puget Sound may be assisted by other federal and local agencies in the enforcement of this safety zone.

Regulatory Analyses

We developed this rule after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analyses based on 13 of these statutes or executive orders.

Regulatory Planning and Review

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this rule would have a significant economic impact on a substantial number of small entities. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

This temporary rule will affect the following entities, some of which may be small entities: the owners or operators of vessels intending to transit a portion of the Puget Sound while this rule is enforced. The safety zone will not have significant economic impact on a substantial number of small entities for the following reasons. This temporary rule will be in effect for no more than 3 hours when vessel traffic volume is low. Traffic will be allowed to pass through the zone with the permission of the Captain of the Port or Designated Representative, and if safe to do so.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we offer to assist small entities in understanding the rule so that they can better evaluate its effects on them and participate in the rulemaking process.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

Collection of Information

This rule calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this rule under that Order and have determined that it does not have implications for federalism.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

Taking of Private Property

This rule will not effect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Protection of Children

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not create an environmental risk to health or risk to safety that may disproportionately affect children.

Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Energy Effects

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations That

Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a ''significant energy action'' under that order because it is not a ''significant regulatory action'' under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded this action is one of a category of actions which do not individually or cumulatively have a significant effect on the human environment. This rule is categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction. This rule involves establishing a temporary safety zone. An environmental checklist and categorical exclusion determination are available where indicated under **ADDRESSES**.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

■ For the reasons discussed in the preamble, the Coast Guard amends 33 CFR Part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for Part 165 continues to read as follows:

Authority: 33 U.S.C. 1226, 1231; 46 U.S.C Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6 and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add temporary § 165.T13–123, to read as follows:

§ 165.T13–123 Safety Zone; Chimes and Lights Fireworks Display, Port Orchard, WA.

(a) *Safety Zone.* The following area is designated a safety zone: Port Orchard Bay, WA

(i) Location. All waters of Sinclair Inlet extending out to a 500' radius from the fireworks launch site located north of the town of Port Orchard at Radar Site ''C'' at 47°32′45″ N, 122°38′02″ W (NAD 1983).

(ii) Effective time and date. 5 p.m. to 8 p.m. on December 5, 2009.

(b) *Regulations.* In accordance with the general regulations in Section 165.23 of this part, no person or vessel may enter or remain in this zone unless authorized by the Captain of the Port or Designated Representative.

(c) *Enforcement Period.* This section is effective from 5 p.m. to 8 p.m. on December 5, 2009. If the need for the termination of the safety zone occurs before the scheduled termination time, the Captain of the Port will cease enforcement of this section and will announce that fact via Broadcast Notice to Mariners.

Dated: November 13, 2009.

Suzanne E. Englebert,

Captain, U.S. Coast Guard, Captain of the Port, Puget Sound.

[FR Doc. E9–29124 Filed 12–7–09; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 300

[EPA–HQ–SFUND–1990–0011; FRL–9089–8]

National Oil and Hazardous Substance Pollution Contingency Plan; National Priorities List

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct Final Notice of Deletion of the Kerr-McGee (Reed-Keppler Park) (RKP) Superfund Site from the National Priorities List.

SUMMARY: EPA, Region 5 is publishing a direct final Notice of Deletion of the Kerr-McGee Reed-Keppler Park Superfund Site (Site), located in West Chicago, Illinois, from the National Priorities List (NPL). The NPL, promulgated pursuant to Section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, as amended, is an appendix to the National Oil and Hazardous Substances Pollution Contingency Plan (NCP). This direct final deletion is being published by EPA with the concurrence of the State of Illinois, through the Illinois Environmental Protection Agency (IEPA), because EPA has determined that all appropriate response actions under CERCLA have been completed. However, this deletion does not preclude future actions under Superfund.

DATES: This direct final deletion is effective February 8, 2010 unless EPA receives adverse comments by January 7, 2010. If adverse comments are received, EPA will publish a timely withdrawal of the direct final deletion in the **Federal Register** informing the public that the deletion will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID no. EPA–HQ–SFUND–1990–0011, by one of the following methods:

- *E-mail:* Timothy Fischer, Remedial Project Manager, at *timothy.fischer@epa.gov* or Janet Pope, Community Involvement Coordinator, at *pope.janet@epa.gov.*
- *Fax:* Gladys Beard at (312) 886–4071.
- *Mail:* Timothy Fischer, Remedial Project Manager, U.S. Environmental Protection Agency (SR–6J), 77 W. Jackson Blvd., Chicago, IL 60604, (312) 886–5787, or Janet Pope, Community Involvement Coordinator, U.S. Environmental Protection Agency (SI–7J), 77 W. Jackson Blvd., Chicago, IL 60604, (312) 353–0628 or 1–800–621–8431.
- *Hand delivery:* Janet Pope, Community Involvement Coordinator, U.S. Environmental Protection Agency (SI–7J), 77 West Jackson Blvd., Chicago, IL 60604. Such deliveries are only accepted during the docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information. The normal business hours are Monday through Friday, 8:30 a.m. to 4:30 p.m.

Instructions: Direct your comments to Docket ID no. EPA–HQ–SFUND–1990–0011. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://*

www.regulations.gov, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov,* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket

All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information may not be publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in the hard copy. Publicly available docket materials are available either electronically at *http://www.regulations.gov* or in hard copy at:

U.S. Environmental Protection Agency—Region 5, 77 W. Jackson Blvd., Chicago, IL 60604, Hours: Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

West Chicago Public Library, 118 W. Washington St., West Chicago, IL 60185, Phone: (630) 231–1552, Hours: Monday through Thursday, 9 a.m. to 9 p.m.; Friday and Saturday, 9 a.m. to 5 p.m.; and Sundays until May, 1 p.m. to 5 p.m.

FOR FURTHER INFORMATION CONTACT: Timothy Fischer, Remedial Project Manager, U.S. Environmental Protection Agency (SR–6J), 77 W. Jackson Blvd., Chicago, IL 60604, (312) 886–4737, *fischer.timothy@epa.gov.*

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction

EPA Region 5 is publishing this direct final Notice of Deletion of the Kerr-McGee Reed-Keppler Park (RKP) Superfund Site from the NPL. The NPL constitutes Appendix B of 40 CFR part 300, which is the NCP, which EPA promulgated pursuant to Section 105 of the CERCLA of 1980, as amended. EPA maintains the NPL as the list of sites that appear to present a significant risk to public health, welfare, or the environment. Sites on the NPL may be the subject of remedial actions financed by the Hazardous Substance Superfund (Fund). As described in 300.425(e)(3) of the NCP, sites deleted from the NPL remain eligible for Fund-financed remedial actions if future conditions warrant such actions.

Because EPA considers this action to be noncontroversial and routine, this action will be effective February 8, 2010 unless EPA receives adverse comments by January 7, 2010. Along with this direct final Notice of Deletion, EPA is co-publishing a Notice of Intent to Delete in the ''Proposed Rules'' section of the **Federal Register**. If adverse comments are received within the 30-day public comment period on this deletion action, EPA will publish a timely withdrawal of this direct final Notice of Deletion before the effective date of the deletion, and the deletion will not take effect. EPA will, as appropriate, prepare a response to comments and continue with the deletion process on the basis of the Notice of Intent to Delete and the comments already received. There will be no additional opportunity to comment.

Section II of this document explains the criteria for deleting sites from the NPL. Section III discusses procedures that EPA is using for this action. Section IV discusses the RKP Site and demonstrates how it meets the deletion criteria. Section V discusses EPA's action to delete the Site from the NPL unless adverse comments are received during the public comment period.

II. NPL Deletion Criteria

The NCP establishes the criteria that EPA uses to delete sites from the NPL. In accordance with 40 CFR 300.425(e), sites may be deleted from the NPL where no further response is appropriate. In making such a determination pursuant to 40 CFR 300.425(e), EPA will consider, in consultation with the State, whether any of the following criteria have been met:

i. Responsible parties or other persons have implemented all appropriate response actions required;

ii. All appropriate Fund-financed response under CERCLA has been implemented, and no further response action by responsible parties is appropriate; or

iii. The remedial investigation has shown that the release poses no significant threat to public health or the environment and, therefore, the taking of remedial measures is not appropriate.

Pursuant to CERCLA Section 121(c) and the NCP, EPA conducts five-year reviews to ensure the continued protectiveness of remedial actions where hazardous substances, pollutants, or contaminants remain at a site above levels that allow for unlimited use and unrestricted exposure. EPA conducts such five-year reviews even if a site is deleted from the NPL. EPA may initiate further action to ensure continued protectiveness at a deleted site if new information becomes available that indicates it is appropriate. Whenever there is a significant release from a site deleted from the NPL, the deleted site may be restored to the NPL without application of the hazard ranking system.

III. Deletion Procedures

The following procedures apply to deletion of the Site:

(1) EPA consulted with the State of Illinois prior to developing this direct final Notice of Deletion and the Notice of Intent to Delete co-published today in the ''Proposed Rules'' section of the **Federal Register**.

(2) EPA has provided the State 30 working days for review of this notice and the parallel Notice of Intent to Delete prior to their publication today, and the State, through the Illinois Environmental Protection Agency, has concurred on the deletion of the Site from the NPL.

(3) Concurrently with the publication of this direct final Notice of Deletion, a notice of the availability of the parallel Notice of Intent to Delete is being published in a major local newspaper, The Daily Herald. The newspaper notice announces the 30-day public comment period concerning the Notice of Intent to Delete the Site from the NPL.

(4) EPA placed copies of documents supporting the proposed deletion in the deletion docket and made these items available for public inspection and copying at the Site information repositories identified above.

(5) If adverse comments are received within the 30-day public comment period on this deletion action, EPA will publish a timely notice of withdrawal of this direct final Notice of Deletion before its effective date and will prepare a response to comments and continue with the deletion process on the basis of the Notice of Intent to Delete and the comments already received.

Deletion of a site from the NPL does not itself create, alter, or revoke any individual's rights or obligations. Deletion of a site from the NPL does not in any way alter EPA's right to take enforcement actions, as appropriate. The NPL is designed primarily for informational purposes and to assist EPA management. Section 300.425(e)(3) of the NCP states that the deletion of a site from the NPL does not preclude eligibility for future response actions, should future conditions warrant such actions.

IV. Basis for Site Deletion

The following information provides EPA's rationale for deleting the Site from the NPL.

Early site investigations at the RKP Site found elevated levels of radioactive thorium in site soils. A removal action was conducted at the RKP Site, and a Final Report for the RKP Site removal action was submitted and approved by EPA in April 2002. This report documented that all cleanup criteria for soils at the RKP Site had been successfully achieved.

In September 2002, EPA issued a Record of Decision (ROD) for the RKP Site which called for No Further Action, along with associated groundwater monitoring for total uranium at the site.

A five-year review was completed on August 13, 2007, and the review concluded that the site remedy was protective of human health and the environment.

On January 28, 2008, EPA agreed that the remedial objective for uranium in groundwater had been achieved, based upon five groundwater sampling events between June 2006 and December 2007. On March 18, 2008, the responsible parties completed abandonment of all site monitoring wells. The Site has now achieved all remedial objectives.

Site Location

The Kerr-McGee Reed-Keppler Park Site is a 100-acre community park located in the northwestern portion of West Chicago, DuPage County, Illinois, about 30 miles west of Chicago, Illinois. The Kerr-McGee Reed-Keppler Park Site is located north of National Street and west of Arbor Avenue. The majority of the Kerr-McGee Reed-Keppler Park Site is owned by the City of West Chicago, and is leased to and operated by the West Chicago Park District (Park District) for use as a public recreation area. The park is used for a variety of activities including tennis, volleyball, soccer, and baseball/softball. The land use within one mile of the site is primarily residential. The Park District's Family Aquatic Center is also located in the northeast section of the Reed-Keppler Park.

Site History

In the early 1900's, the RKP Site was mined as a quarry to provide rock and embankment material for construction of the Chicago, Wheaton and Western Railway (now the Illinois Prairie Path embankment owned by Commonwealth Edison). This old quarry area was left as a topographic low area and was subsequently used for solid waste (household and commercial garbage) disposal from as early as 1939 until 1973. Among the solid wastes found at the RKP Site were thorium mill tailings and other process wastes generated at the West Chicago Rare Earths Facility (REF), operated in West Chicago by Lindsay Light and Chemical Company, and its successors, from 1934 until 1973. In 1967, Kerr-McGee Chemical Corporation purchased the REF and maintained operations until the facility was closed in 1973.

Several site investigations were conducted, and in 1996, EPA determined that the level of contamination in the surface soils at the RKP Site warranted a time-critical removal action and that removal decision was documented in an Action Memorandum. The Action Memorandum reported that the median level of soil contamination, based upon soil samples collected at the RKP Site, was 286 picoCuries per gram (pCi/g) of total radium, with the maximum exceeding 15,000 pCi/g. The Action Memorandum concluded that contaminated soil should be removed until a cleanup criterion of 5 pCi/g of total radium (radium-226 + radium-228) over background was achieved. The background concentration for the RKP Site was determined to be 2.2 pCi/g, thereby establishing the cleanup criterion for the RKP Site at 7.2 pCi/g. The Action Memorandum, along with an Action Criteria Document that explained the radiation cleanup level, formed the basis for EPA's Unilateral Administrative Order (UAO), which was issued to Kerr-McGee Chemical Corporation and the City of West Chicago, Illinois, requiring removal activities at the RKP Site to address the radioactive contamination and protect human health and the environment.

A total of 114,652 loose cubic yards of contaminated soil and debris were removed from the RKP Site between April 1997 and October 1999. The contaminated material was then shipped to the REF to be physically separated. All contaminated material was then shipped to a Nuclear Regulatory Commission (NRC) licensed disposal Site in Utah by rail. Final restoration activities for the RKP Site were completed in November 2000. A Final Report for the RKP removal action was submitted to EPA in April 2002, which confirmed that the removal action met all of the requirements and cleanup criteria specified in the Action Memorandum and the Action Criterion Document for the RKP Site.

Remedial Investigation and Feasibility Study (RI/FS)

After the completion of the soil removal action at RKP, EPA determined that all action necessary to protect human health and the environment had been taken with respect to the soils at the RKP Site. Due to an exceedance of the drinking water standard for uranium in one monitoring well at the site, EPA required monitoring of nine wells at the site. The EPA monitored these wells until sufficient data was collected to insure that all groundwater concentrations were decreasing and that the drinking water standard for uranium had been attained in all the site wells.

Groundwater data were collected in 1994 and 1997 at the RKP Site as part of investigation efforts at the site. Concentrations of total dissolved uranium, elevated above background, were detected in wells 4 and 5 in October 1994. Wells 1, 2, 3, 4, and 5 were subsequently abandoned or removed from the site during excavation of contaminated soil.

Kerr-McGee installed five new monitoring wells (1–5) at the RKP Site in November 1997. Monitoring wells 7–9 were also subsequently installed to replace some of the original Site wells that had been removed as part of site excavation activities.

In August 2001, additional groundwater samples were collected from the nine RKP monitoring wells to determine if residual groundwater contamination levels achieved the remedial objective following completion of the removal action at the RKP Site. One well (RKP–5) exhibited concentrations of total uranium in exceedance of the drinking water standard for total uranium in 40 CFR 141. This standard, also known as the Maximum Contaminant Level (MCL), is

30 micrograms per liter (µg/L) for total uranium. This corresponds to a radioactivity level of about 27 picoCuries per liter (pCi/L). The concentration of uranium in RKP–5 in August 2001 was 37.1 pCi/L. All of the other RKP monitoring wells were in compliance with the MCL.

EPA cleanups conducted under CERCLA are legally required to comply with all Applicable or Relevant and Appropriate Requirements (ARARs). The MCLs in the Safe Drinking Water Act are considered an ARAR for all CERCLA sites that overlie aquifers that are used, or may be reasonably anticipated to be used, as a drinking water source in the future. EPA promulgated the MCL for total uranium in 65 FR 76708, National Primary Drinking Water Regulations, on December 7, 2000. The State of Illinois has designated the groundwater aquifer underlying the RKP site and the City of West Chicago as Class I—Potential Potable Groundwater Resource in accordance with 35 Illinois Administrative Code (IAC) Part 620 Subpart B, Groundwater Classification for Class I Designation and IAC Part 620 Subpart D, State of Illinois Groundwater Quality Standards.

Due to the exceedance of the drinking water standard for uranium in monitoring well RKP–5, EPA required monitoring of the nine site wells until sufficient data was collected to insure that all groundwater concentrations were decreasing and that the drinking water standard for uranium in 40 CFR Part 141 (30 µg/L or 27 pCi/L) had been attained in all site wells.

Record of Decision Findings

In September 2002, EPA issued a Record of Decision ROD for the RKP Site which selected No Further Action, along with associated groundwater monitoring for total uranium at the RKP Site. Due to the exceedance of the drinking water standard for uranium at monitoring well RKP–5, at the RKP Site, however, EPA required monitoring of the nine site wells until sufficient data was collected to insure that all groundwater concentrations were decreasing and that the drinking water standard for uranium in 40 CFR Part 141 (30 µg/L or 27 pCi/L) had been attained in all site wells. When EPA issued the ROD, EPA did not expect that active treatment of the groundwater underlying the RKP Site would be required because:

(1) The removal action conducted from 1997 to 2000 by Kerr-McGee removed the source of uranium contamination (the radioactively contaminated subsurface soils below the water table at RKP Site). Therefore, there was no continuing source of uranium in the subsurface soil to be released to groundwater and cause the concentrations in groundwater to increase.

(2) Only one of the nine wells at the RKP Site (RKP–5) exhibited groundwater contamination above the MCL drinking water standard for uranium (30 µg/L or 27 pCi/L). Six of the nine RKP monitoring wells were located in areas that were considered downgradient from the former quarry and landfill areas at the site. RKP–5 was also sampled in January 1998 and the concentration of uranium in the well at that time was 7.43 pCi/L, which was below the MCL. RKP–5 was in compliance with the MCL when it was sampled in 1998 and the result in August 2001 was only marginally above the MCL. Consequently, there was a high probability that the 37.1 pCi/L result was an isolated sample result that would diminish within a reasonable time. In fact, beginning in December 1997, a total of 15 samples have been collected from the nine RKP groundwater wells, and the 37.1 pCi/L result from RKP–5 in August 2001 was the only exceedance of the MCL in the data set.

(3) Although EPA considered the shallow aquifer underlying and surrounding the area of the RKP site a potential drinking water source, the City of West Chicago prohibited the use of the groundwater by residents and required its residents to abandon groundwater wells in the City of West Chicago. In addition, the City of West Chicago obtained its drinking water from nine municipal wells, two of which were in the vicinity of the RKP Site. These wells are screened in a deep aquifer system, which is separated from the shallow aquifer by a Silurian dolomite and Maquoketa shale layer that inhibits the vertical flow of groundwater from the upper aquifer to the underlying formation. Therefore, it was extremely unlikely that contaminants in the upper aquifer could migrate to the draw down zones of the City wells. Shallow groundwater in the vicinity of the RKP Site is not used as a drinking water source. There were no known conduits between the shallow and deep aquifers, and no site related contaminants have been detected in any of the nine City wells above background concentrations. Consequently, there was no reason to believe that a complete pathway to human receptors existed, nor was one expected to form given the City of West Chicago's ordinance prohibiting the use of groundwater in the area.

Groundwater monitoring was conducted at the RKP Site from June 2006 until December 2007, when it was demonstrated that the MCL had been achieved, and maintained, for three consecutive sampling events. On January 28, 2008, EPA agreed that the remedial objective for uranium in groundwater had been achieved and that monitoring well abandonment could take place at the RKP Site. On March 18, 2008, Tronox (formerly Kerr-McGee) completed abandonment of all RKP Site wells.

Cleanup Goals

Groundwater monitoring was performed at the RKP Site five times between June 2006 and December 2007. The groundwater remedial objective was to monitor ''to insure that future concentrations of uranium in the RKP Site groundwater meet the MCL drinking water standard of 30 µg/L, or 27 pCi/L. It was decided that monitoring would continue until it has been demonstrated that the MCLs have been achieved, and maintained, for three consecutive sampling events.'' There were five sampling events conducted between June 2006 and December 2007 and none of the sample results exceeded the uranium concentration remedial goal of 30µg/L. For this reason, EPA declared all response actions complete for the RKP Site. The monitoring wells were subsequently abandoned in March 2008, and there are no remaining physical remnants of the response action at the RKP Site left on site.

Operation and Maintenance

There are no remaining operation and maintenance requirements for the RKP Site. All response activities are complete and all physical remnants have been removed.

Five-Year Review

One five-year review was completed for the RKP Site on August 13, 2007. The five-year review concluded that the site remedy was protective of human health and the environment. The five-year review recommended that some maintenance be conducted on site monitoring wells if groundwater monitoring was to be conducted into the future. This recommendation was no longer a concern after the remedial objective for uranium in groundwater was achieved within one and a half years of the beginning of monitoring in 2006. All RKP monitoring wells have since been abandoned. No more five-year reviews will be conducted at the site.

Community Involvement

Public participation activities have been satisfied as required in CERCLA Section 113(k), 42 U.S.C. 9613(k), and CERCLA section 117, 42 U.S.C. 9617. Documents in the deletion docket which EPA relied on for recommendation of the deletion of this site from the NPL are available to the public in the information repositories and at *www.regulations.gov.*

Determination That the Site Meets the Criteria for Deletion in the NCP

The NCP (40 CFR 300.425(e)) states that a site may be deleted from the NPL when no further response action is appropriate. EPA, in consultation with the State of Illinois, has determined that the responsible parties have implemented all response actions required, and no further response action by responsible parties is appropriate.

V. Deletion Action

EPA, with concurrence from State of Illinois through the Illinois Environmental Protection Agency, has determined that all appropriate response actions under CERCLA have been completed. Therefore, EPA is deleting the Site from the NPL.

Because EPA considers this action to be noncontroversial and routine, EPA is taking it without prior publication. This action will be effective *February 8, 2010* unless EPA receives adverse comments by *January 7, 2010.* If adverse comments are received within the 30-day public comment period, EPA will publish a timely withdrawal of this direct final Notice of Deletion before the effective date of the deletion, and it will not take effect. EPA will prepare a response to comments and continue with the deletion process on the basis of the notice of intent to delete and the comments already received. There will be no additional opportunity to comment.

List of Subjects in 40 CFR Part 300

Environmental protection, Air pollution control, Chemicals, Hazardous waste, Hazardous substances, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Superfund, Water pollution control, Water supply.

Dated: November 20, 2009.

Bharat Mathur,

Acting Regional Administrator, Region 5.

■ For the reasons set out in this document, 40 CFR part 300 is amended as follows:

PART 300—[AMENDED]

■ 1. The authority citation for part 300 continues to read as follows:

Authority: 33 U.S.C. 1321(c)(2); 42 U.S.C. 9601–9657; E.O. 12777, 56 FR 54757, 3 CFR, 1991 Comp., p. 351; E.O. 12580, 52 FR 2923; 3 CFR, 1987 Comp., p. 193.

Appendix B—[Amended]

■ 2. Table 1 of Appendix B to part 300 is amended by removing ''Kerr-McGee (Reed Keppler Park)'', ''West Chicago'', ''IL''.

[FR Doc. E9–29081 Filed 12–7–09; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF VETERANS AFFAIRS

48 CFR Parts 802, 804, 808, 809, 810, 813, 815, 817, 819, 828, and 852

RIN 2900–AM92

VA Acquisition Regulation: Supporting Veteran-Owned and Service-Disabled Veteran-Owned Small Businesses

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: This document implements portions of the Veterans Benefits, Health Care, and Information Technology Act of 2006 (the Act) and Executive Order 13360, providing opportunities for service-disabled veteran-owned small businesses (SDVOSB) to increase their Federal contracting and subcontracting. The Act and the Executive Order authorize the Department of Veterans Affairs (VA) to establish special methods for contracting with SDVOSBs and veteran-owned small businesses (VOSB). Under this final rule, a VA contracting officer may restrict competition to contracting with SDVOSBs or VOSBs under certain conditions. Likewise, sole source contracts with SDVOSBs or VOSBs are permissible under certain conditions. This final rule implements these special acquisition methods as a change to the VA Acquisition Regulation (VAAR).

This document additionally amends SDVOSB/VOSB, Small Business Status Protests, where VA provided that VA would utilize the U.S. Small Business Administration (SBA) to consider and decide SDVOSB and VOSB status protests. This requires VA and SBA to execute an interagency agreement pursuant to the Economy Act. Negotiations of this interagency agreement have not yet been finalized. Therefore, VA has amended these regulations with an interim rule to provide that VA's Executive Director, Office of Small and Disadvantaged Business Utilization (OSDBU) shall consider and decide SDVOSB and VOSB status protests, and provides procedures there for, until such time as the interagency agreement is executed by the agencies. VA hereby solicits comments on this regulatory amendment only.

DATES: January 7, 2010. *Comment date:* Comments on the amendments regarding section 819.307, only, must be received on or before January 7, 2010.

FOR FURTHER INFORMATION CONTACT: Arita Tillman, Acquisition Policy Division (001AL–P1A), Office of Acquisition and Logistics, Department of Veterans Affairs, 810 Vermont Ave., NW., Washington, DC 20420, telephone (202) 461–6859, or e-mail *Arita.Tillman@va.gov.*

SUPPLEMENTARY INFORMATION: On August 20, 2008, VA published in the **Federal Register** (73 FR 49141–49155) a proposed rule to revise the VAAR to implement portions of Public Law 109–461, the Veterans Benefits, Health Care and Information Technology Act of 2006, and Executive Order 13360, providing opportunities for SDVOSBs and VOSBs to increase their federal contracting and subcontracting. Comments were solicited concerning the proposal for 60 days, ending October 20, 2008. VA received 97 comments, many of which were groups of identical responses in form letters. Most commenters raised more than one issue. The issues raised in the comments are discussed below.

1. SDVOSB and VOSB Verification

Comment: Several comments were received regarding the validity of VA's Vendor Information Pages (VIP) database registration process, expressing concern for ''pass through'' business relationships and the potential for other fraudulent actions.

Response: The regulations governing the verification of VOSB status, which are in 38 CFR Part 74, are not the subject of this rulemaking. Accordingly, we will not make any changes based upon the comments. In the past, vendors could register themselves in the VA vendor database and self certify the accuracy of the information provided. However, section 502 of Public Law 109–461 requires VA to maintain a database of SDVOSBs and VOSBs and that VA verify that status. Section 74.2 sets out the eligibility requirements for VIP verification, and 38 CFR 74.3 sets out the criteria for a VOSB. Further, this final rule under section 802.101, Definitions, prescribes that SDVOSBs

and VOSBs must be listed as verified in the VIP database to participate in the Veterans First Contracting Program. The verification process is set out in 38 CFR 74.20 and requires VA Center for Veteran Enterprise officials to verify the accuracy of information vendors provide as part of the VetBiz VIP Verification application process. This verification process should alleviate some of the commenters' concern about ''pass through'' business relationships since the information contained in applications is subject to review and verification. Section 804.1102 of the proposed rule requires that SDVOSBs and VOSBs must be registered in the VIP database, available at *http://www.VetBitz.gov,* in addition to being registered in the Central Contractor Registration (CCR), as required by 48 CFR subpart 4.11, to be eligible to participate in VA's Veteran-owned Small Business prime contracting and subcontracting opportunities programs. To further address the validity of the VIP database registration process, to clarify the requirement of this section, and to allow VA time to adequately verify firms, this section is revised to state that prior to January 1, 2012, SDVOSBs and VOSBs must be listed in the VIP database and registered in CCR to receive new contract awards under this program. After December 31, 2011, SDVOSBs and VOSBs must be listed as verified in the VIP database and registered in CCR to receive new awards under this program.

2. Clarification of Section 813.106

Comment: One commenter stated that proposed section 813.106 in the **SUPPLEMENTARY INFORMATION** section of the Proposed Rule is confusing. Therein, it states that: ''contracting officers may use other than competitive procedures to enter into a contract with a SDVOSB or VOSB when the amount is less than the simplified acquisition threshold not to exceed $5 million.''

Response: Proposed section 813.106 stated that ''Contracting officers may use other than competitive procedures to enter into a contract with a SDVOSB or VOSB when the amount is less than the simplified acquisition threshold.'' However, as noted by the commenter, the **SUPPLEMENTARY INFORMATION** section in the proposed rule addressing section 813.106 describes the amount as ''less than the simplified acquisition threshold not to exceed $5 million.'' First, 38 U.S.C. 8127(b) provides that VA may conduct other than competitive procurements up to the simplified acquisition threshold. Next, 38 U.S.C. 8127(c) provides that a VA contracting officer may award a contract to veteran owned small business concerns using other than competitive procedures if the anticipated award price including options will exceed the simplified acquisition threshold (as defined in the section 4 of the Office of Federal Procurement Policy Act (41 U.S.C. 403) but will not exceed $5 million.

In order to address the comment and provide clarification, proposed section 813.106 has been renumbered as section 813.106(a) and revised to state: ''Contracting officers may use other than competitive procedures to enter into a contract with a SDVOSB or VOSB when the amount exceeds the micro-purchase threshold up to $5 million.'' This change will provide that VA contracting officers can award any procurement from the micro-purchase, which is currently $3,000 for supplies, up to $5 million using other than competitive procedures to be in accordance with both sections 8127(b) and (c). Purchases under the micro-purchase threshold are still available for award to any source, large or small, to promote administrative and economic efficiency of internal VA operations. However, section 813.202 does provide that micro-purchases shall be equitably distributed among SDVOSBs and VOSBs to the maximum extent practical.

Comment: A commenter recommended that in section 813.106, the word ''may'' be changed to ''shall.''

Response: We disagree with the commenter and believe the regulation clearly implements the discretion provided in 38 U.S.C. 8127(c) in accordance with the statute. The statutory language states a contracting officer may award a contract to a small business concern owned and controlled by veterans using other than competitive procedures. We believe the determination whether or not to use other than competitive procedures under this section is a business decision that is left to the discretion of the contracting officer. Therefore, no change is being made to the rule based on this comment.

3. Applicability to Architect-Engineering (A/E) Services

Comment: Several commenters asked whether proposed subpart 819.70 applies to the award of sole source VOSB and SDVOSB contracts for A/E contracts.

Response: This rule does not apply to the procedures to procure A/E services. Pursuant to the Brooks Act (Pub. L. 92–582), A/E services cannot be awarded on a sole source basis. The Brooks Act requires Federal agencies to publicly announce all requirements for A/E services, and to negotiate contracts for A/E services on the basis of demonstrated competence and qualification for the type of professional services required at fair and reasonable prices. The sole source authority in 38 U.S.C. 8127 does not override the Brooks Act because under general principles of statutory interpretation the specific governs over general language. In this instance, A/E contracting statutes govern versus contracting in general. However, since the Small Business Competitiveness Demonstration Program in subpart 19.10 of the Federal Acquisition Regulation (FAR) includes A/E services as a designated industry group (DIG), VA contracting officers may use the provisions of 38 U.S.C. 8127 and this rule when procuring DIG requirements. Section 19.1007(b)(2) of the FAR, 48 CFR 19.1007(b)(2), establishes that Section 8(a), Historically Underutilized Business (HUB) Zone and SDVOSB set-asides, must be considered in DIG acquisitions. However, using the provisions of 38 U.S.C. 8127 and this rule, VA personnel may change the order of priority to consider SDVOSB and VOSB set-asides before Section 8(a) and HUB Zone set-asides when procuring A/E services under the Small Business Competitiveness Demonstration Program.

Comment: One commenter noted that section 852.219–10(c) indicates that for services (except construction), at least 50 percent of the personnel costs must be spent for employees of the particular concern or for employees of other eligible SDVOSB concerns. The commenter stated that because A/E type services are very similar to those in the construction field (*e.g.,* specialty trade), which only require subcontractors to perform just 25 percent of the total work, A/E contractors should also be permitted to perform 25 percent (versus 50 percent) of the work.

Response: This rule follows guidance in the generally applicable, government-wide U.S. Small Business Administration (SBA) regulations and the Federal Acquisition Regulations that set out subcontracting requirement limits for government-wide set-aside programs. See 13 CFR 125.6; 48 CFR part 19. These regulations require for a services contract (except construction) that the small business concern will perform at least 50 percent of the cost of the contract incurred for personnel with its own employees. In the case of a contract for supplies or products (other than procurement from a non-manufacturer in such supplies or products), the concern will perform at least 50 percent of the cost of

manufacturing the supplies or products (not including the costs of materials). In the case of a contract for general construction, the concern will perform at least 15 percent of the cost of the contract with its own employees (not including the costs of materials). VA's rule follows the SBA model as these percentages are commonly applied and accepted in government-wide set aside authorities. VA has no rational basis to adjust these percentages and, for administrative ease, does not want to have to enforce separate sets of subcontracting limitations for set asides with SDVOSB/VOSBs versus other socio-economic set aside programs. Further, these subcontracting limitations ensure that the services will be performed by the veteran business owner's employees. We believe the 50 percent requirement contained in this rule is appropriate and consistent with generally accepted guidance on small business programs regarding subcontracting limitations. Therefore, no change will be made.

4. Definition of SDVOSB Concern and Succession of the Business

Comment: Several commenters suggested that the definition of SDVOSB be amended to add the following information: ''The management and daily operations of the business are controlled by one or more service-disabled veteran(s) or in the case of a veteran with a permanent and severe disability, the spouse or permanent caregiver of such veteran be authorized to participate in the program on his or her behalf.''

Two commenters suggested the ''SDVOSB concern'' definition be expanded to include spouses who gain ownership of a business upon the death of any service-disabled veteran or a veteran regardless of the cause or the percent of disability. The SDVOSB status would last for a period of 2 years or until the spouse re-marries or sells the interest in the business.

Several commenters felt that the current succession definition is restrictive since surviving spouses of deceased veterans may only succeed the business if the veteran had a 100 percent disability.

One commenter suggested that the surviving spouse should be able to continue the business for at least 10 years regardless of the disability rating of the veteran.

Another commenter suggested that spouses of any service-disabled veteran of any level of disability or a veteran who died for any reason should have a 2-year period to ''sunset'' the business to protect all employees from predatory takeovers and to safeguard the value of the business concern.

Other commenters suggested that any surviving children or permanent care giver of the veteran also should be afforded the opportunity to participate in this program.

Response: The criteria for treatment of the business after the death of the veteran owner are in 38 U.S.C. 8127(h). Under current law, the surviving spouse of a veteran with a service connected disability rating of 100 percent disabled or who died as a result of a service connected disability would maintain the SDVOSB status. The surviving spouse would retain this status until he or she re-marries, relinquishes an ownership interest in the small business, or for 10 years after the death of the veteran, whichever occurs first. VA cannot interpret section 8127(h) as suggested by the commenters because the plain statutory language clearly prescribes the criteria for surviving spouse succession. There is no statutory authority to include participation of a spouse who is the caregiver to a living veteran owner, permanent caregiver of a disabled veteran or surviving children in the program. Furthermore, the length of participation by a surviving spouse is prescribed in section 8127(h). The commenter's suggestion to include a 2-year participation period for the spouse of a service-disabled veteran regardless of the disability rating goes beyond the authority provided in the current law. The only succession of the business authorized for the program by Congress in section 8127(h) is to the surviving spouse of a veteran who had a service connected disability rating of 100 percent or who died as a result of a service connected disability. Congress has not otherwise authorized other categories of persons to maintain SDVOSB status for business succession purposes. Given that any change to the current definition would require revised statutory authority, no change may be made through this rulemaking process. The definition provided in proposed section 802.101 for SDVOSB concerns is adequate and consistent with the criteria in 38 U.S.C. 8127(h).

5. Synopsis Requirements

Comment: One commenter stated that proposed section 819.7007, requiring synopsis of prospective sole source contracts, conflicts with VA Information Letter 049–07–08. The commenter further stated that the Small Business Administration (SBA) Section 8(a) program does not require a synopsis for sole source awards.

Response: The commenter is correct that there is a difference between the synopsis requirement in VA Information Letter 049–07–08 and as proposed in this rule. The letter states that a synopsis is not required, but this final rule states a contracting officer may award contracts to SDVOSBs or VOSBs on a sole source basis provided that ''the requirement is synopsized in accordance with the Federal Acquisition Regulations Part 5.'' The provisions contained in this rule will supersede those contained in the letter. Further, the synopsis requirement is changed in order to ensure that all activity under VA's Veterans First Contracting Program has full transparency for all concerns, including those of the American taxpayer. Therefore, a notice of intent to issue a sole source contract will be published prior to the award of sole source contracts. Note that VA's Veterans First Contracting Program, unlike SBA's Section 8(a) program, is not a business development program. The Section 8(a) program addresses small business that must be unconditionally owned and controlled by one or more socially and economically disadvantaged individuals who are of good character and citizens of the United States. This socio-economic program is designed to aid fledgling small businesses controlled by such disadvantaged individuals so that they may become familiar with the federal procurement process and eventually grow in size and capability to graduate from the Section 8(a) program. VA does not consider veterans to fall into the same category as Section 8(a) individuals. While veterans' service will entitle them to priority in many contracting opportunities with VA, VA finds that the goals of the Section 8(a) program (aiding socially disadvantaged individuals) are separate and distinct from those in this proposed regulation (priority for veteran small businesses in most procurement opportunities). As stated, VA desires transparency in SDVOSB/VOSB sole source procurements as the number of awards under this authority is likely to be significantly greater than Section 8(a) awards.

In addition, section 813.106(b) has been added to the final rule to include a synopsis requirement for contracting actions estimated to exceed $25,000, which are performed under the purview of section 813.106(a). This synopsis requirement will likewise provide for greater transparency within the Veterans First Contracting Program with regard to non-competitive procurements under this section.

6. Priorities of SDVOSB Contractors

Comment: One commenter stated there should be a distinction made between those service-disabled veterans who were injured in combat and those veterans who sustained non-combat related injuries.

Response: The criteria for priority for contracting preferences are prescribed in 38 U.S.C. 8127(i). Under current law, VA makes no distinction between combat and non-combat disabled veterans. The only distinction authorized by Congress in section 8127 is between small business concerns owned by veterans generally and those owned by veterans with service-connected disabilities. Congress has not otherwise authorized any preference for combat veterans. Given that any change to the current categories would require revised statutory authority, no changes will be made based upon the comment.

7. Change to Federal Acquisition Regulation (FAR)

Comment: One commenter questioned why this is a change to the VA Acquisition Regulations (VAAR) and not the FAR. Another commenter stated he would like to see the same wording in the FAR or a Federal Acquisition Circular.

Response: Sections 8127 and 8128 of title 38, U.S.C., contain provisions that authorize VA to create a VA-specific procurement program to provide contracting preference to SDVOSBs and VOSBs. VA is required to give priority in contracting to small businesses owned and controlled by veterans, but the program is not intended to have government-wide applicability under the FAR. Congress has not authorized a similar procurement program applicable to all federal agency contracting. Accordingly, this rulemaking is limited to VA and therefore, can only be implemented in VA's FAR supplement, the VAAR. This VA specific rule is a logical extension of VA's mission to care for and assist veterans in returning to private life. It provides VA with the new contracting flexibilities to assist veterans in doing business with VA. SDVOSBs and VOSBs will obtain valuable experience through this VA program that can be useful in obtaining contracts and subcontracts with other government agencies as well.

8. Equitable Distribution of Small Business Opportunities

Comment: One commenter stated concern over the equitable distribution of procurement opportunities available to small businesses. As a small business owner, the commenter sees few opportunities for a small construction company to work with VA given the recent legislation authorizing set-aside and negotiated procurements for veterans, HUBZone contractors, woman-owned, and Section 8(a) firms. The commenter also stated VA is paying a premium for construction contracts that are awarded as small business set-asides.

Response: VA is required to adhere to a strict order of priority as prescribed in 38 U.S.C. 8127(i). Further, in accordance with both the Federal Acquisition Regulations (FAR) and VA Acquisition Regulations, contracting officers are required to conduct a thorough cost and/or price analysis to ensure that the government is receiving a fair and reasonable price. However, because the Small Business Competitiveness Demonstration Program in FAR subpart 19.10 includes construction as a designated industry group (DIG), VA contracting officers may use the provisions of 38 U.S.C. 8127 and this rule when procuring DIG requirements. FAR 19.1007(b)(2) establishes that Section 8(a), HUBZone and SDVOSB set-asides must be considered. However, using the provisions of 38 U.S.C. 8127, as implemented in this rule, VA personnel may change the order of priority to consider SDVOSB and VOSB set-asides before Section 8(a) and HUB Zone set-asides when procuring construction contracts under the Small Business Competitiveness Demonstration Program. Due to this statutorily prescribed contracting preference for SDVOSBs and VOSBs in VA acquisitions, other small-business owners may be disadvantaged by this rule in securing contracts with VA. Nevertheless, VA is obligated to implement the public policy set forth in statute that favors SDVOSBs and VOSBs over other small business concerns.

9. AbilityOne Program Procurement List Protection

Comment: A comment was received stating the AbilityOne Network is the largest source of employment for people who are blind or have severe disabilities, including service-disabled veterans. The commenter stated that not all veterans are interested in owning a business as many prefer employment support, which is available through AbilityOne. One commenter expressed concern that this rule may adversely affect future AbilityOne contracts, which may result in fewer employment opportunities for veterans. The commenter stated the set-asides do not offer protection for disabled veterans who cannot or do not want to own their own businesses.

Response: This rule will not negatively impact AbilityOne and its ability to continue to provide employment to disabled veterans. This rulemaking does not alter AbilityOne's status in the ordering preference for current or future items on the AbilityOne procurement list.

Comment: Many commenters stated that the language in the rule does not offer sufficient protection for current AbilityOne program procurement list projects. The commenters request that while VA acquisition personnel may provide VOSB and SDVOSB with priority for new requirements, there should be no ''poaching'' of current AbilityOne projects. The commenter further stated that once a project is on the procurement list, the item should remain on the list unless VA receives consent to take the item out of the AbilityOne program.

Response: We appreciate the comments; however, AbilityOne's priority status has not been changed as a result of this rule. Further, this rule does not impact items currently on the AbilityOne procurement list or items that may be added to the procurement list in the future.

10. AbilityOne Opportunities for Partnership

Comment: Several commenters stated that this is an opportunity for VOSBs and SDVOSBs to partner with AbilityOne to increase VA procurement opportunities for these socioeconomic groups. Several commenters requested that VA modify section 819.7003(c) be modified to include AbilityOne-qualified Non-Profit Agencies (NPAs) who represent people who are blind or severely disabled be eligible to participate in a joint venture under VA's Veterans First Contracting Program. Several other commenters suggested that VA may have difficulty locating veteran organizations with the needed capacity and capability to fully use the authority contained in this rule. These commenters suggested that veteran businesses working with AbilityOne NPAs as subcontractors be given a preference priority. Some commenters suggested that VA revise the purchase priorities in section 808.603 to reflect the following order: SDVOSBs, VOSBs, then SDVOSBs or VOSBs partnering with qualified subcontractors to AbilityOne NPAs.

Response: This rule adopts the SBA's Joint Venture regulations, which provide that a SDVOSB concern may enter into a joint venture agreement with one or more other small business

concerns for the purpose of performing a service disabled veteran owned contract. See 13 CFR 125.15(b)(1)(i). A joint venture of at least one SDVOSB concern and one or more other business concerns may submit an offer as a small business for a competitive service disabled veteran owned contract procurement so long as each concern is under the size standard corresponding to the North American Industrial Classification System (NAICS) code assigned to the contract. All companies must qualify under the SBA guidelines to be considered under section 819.7003. By definition, a small business must be a for profit entity. AbilityOne NPA's are non-profit agencies, therefore, no change can be made to create a blanket joint venture relationship authority between AbilityOne NPAs and SDVOSBs or VOSBs. At present, there is no statutory authority to create an order of priority for AbilityOne contractors working as subcontractors to SDVOSBs or VOSBs.

11. Request for a Specific Order of Preference

Comment: One commenter suggested revising proposed section 808.603 to specifically define the purchase priority hierarchy for use by VA contracting personnel.

Response: We disagree with the commenter and believe that this rule clearly implements the priority purchasing preference for SDVOSB and VOSB in accordance with the statute. Under section 8128(a), VA must give priority to small business concerns owned and controlled by veterans, if the business concern meets the requirements of that contracting preference. In this rule, VA will provide discretion to its contracting officers to override certain statutory priority preferences, such as Federal Prison Industries and Government Printing Office. Under section 8128, VA is implementing priority for SDVOSBs and VOSBs to the extent authorized by the law. Otherwise, if VA's proposed VAAR change does not address other priority preferences set forth in the FAR, then the FAR will govern. On this basis, VA has determined that including a specific hierarchy of priority is not required and no such change will be made to the rule based upon the comment.

12. Conversion of Commercial Activities to Private Sector

Comment: One commenter stated that the proposed rule does not address converting commercial activities to the private sector. The commenter noted that the proposed rule lacks provisions that address a situation where an SDVOSB makes an unsolicited proposal to a VA facility, for example, for housekeeping services.

Response: OMB Circular No. A–76 sets the policies and procedures that federal agencies must use in identifying commercial-type activities and determining whether these activities are best provided by the private sector, by government employees, or by another agency through a fee-for-service agreement. The determination of whether services should be performed by the private sector or government employees is outside the purview of the Veterans First Contracting Program. The term ''unsolicited proposal'' is defined in *Federal Acquisition Regulation (FAR) 2.101*, as a written proposal for a new or innovative idea that is submitted to an agency on the initiative of the offeror for the purpose of obtaining a contract with the government, and is not in response to a request for proposals, Broad Agency Announcement, Small Business Innovation Research topic, Small Business Technology Transfer Research topic, Program Research and Development Announcement, or any other Government-initiated solicitation or program. VA continues to adhere to the procedures in FAR 15.6 and VA Acquisition Regulation section 815.6 as adequate procedures to address the evaluation of unsolicited proposals. The comment is outside the purview of the proposed rule and VA will make no changes to the procedures for evaluating unsolicited proposals.

13. Non-Manufacturers Rule

Comment: Several commenters questioned whether VA would achieve its SDVOSB goals if the non-manufacturer rule is not waived. One commenter stated most small businesses, especially SDVOSBs, are distributors and not manufacturers.

Response: VA did not propose to make any changes to the Federal Acquisition Regulation (FAR) requirements of the non-manufacturer rule. Therefore, the FAR requirements of the non-manufacturer rule will continue to apply to SDVOSB/VOSB procurements under this authority. The non-manufacturers rule provides that a contractor under a small business set-aside contract shall be a small business that does not exceed 500 employees and that provides either its own product or that of another domestic small business manufacturing or processing concern. See 13 CFR 121.406(b)(1)(i)–(iii). The underlying intent of the non-manufacturer rule is to aid small business by ensuring that the government only buy products under set asides that are actually manufactured by small businesses. Since the effective date of section 8127, VA has met its SDVSOB and VOSB goals as established by the Secretary of Veterans Affairs. Therefore, no change is being made to the rule based on this comment.

14. Federal Prison Industries (FPI)

Comment: One commenter stated that inclusion of the FPI in the proposed rule totally circumvents recent legislation amending FAR 8.601 and 18 U.S.C. 4121–4128.

Response: The enabling statute for the FPI is 18 U.S.C. 4121–4128. Federal Acquisition Regulation (FAR) subpart 8.6 implements the provisions of 18 U.S.C. 4121–4128. Generally, FPI is a priority source in federal procurement for items contained on FPI's procurement list. However, FPI's status as a required source for VA acquisitions will be changed by this rule. This rule at section 808.603 states that VA contracting officers may purchase supplies and services on FPI's procurement list from eligible SDVOSBs and VOSBs without regard to the FAR and other statutory priority status rules for FPI based on the priority provided for SDVOSBs and VOSBs without regard to any other provision of law in 38 U.S.C. 8128. Therefore, we will not change the rule based on the comment.

15. Limitations on Subcontracting

Comment: One commenter stated that the requirement for an SDVOSB to perform 50 percent of the labor costs should not be mandatory since SDVOSBs cannot typically support the labor force mandated by this requirement.

Response: VA is applying the percentages that are common for all government set-aside programs. The current regulation regarding the limitation on subcontracting requirements for other set-aside programs is 13 CFR 125.6. The regulation requires (except construction) that the small business concern will perform at least 50 percent of the cost of the contract incurred for personnel with its own employees. In the case of a contract for supplies or products (other than procurement from a non-manufacturer in such supplies or products), the concern will perform at least 50 percent of the cost of manufacturing the supplies or products (not including the costs of materials). In the case of a contract for general construction, the concern will perform at least 15 percent of the cost of the contract with its own employees (not including the costs of materials). The Federal Acquisition Regulation (FAR) clauses, which implement these

subcontracting limitation requirements, include FAR 52.219–4, 52.219–14, and 52.219–27. The language included in this rule is consistent with these current limitations on subcontracting requirements typical to all manner of small business set-asides. Also, requiring SDVOSBs and VOSBs to perform 50 percent of the labor costs furthers the intent of this rule, which is to promote SDVOSBs and VOSBs. Therefore, no change will be made to the rule based on this comment.

16. Mentor-Protégé Program

Comment: One commenter stated the SDVOSB goal to perform 50 percent of the cost of the contract should be removed if VA is to achieve its SDVOSB goal.

Response: The VA Mentor-Protégé Program is designed to encourage mentors to provide assistance to SDVOSB and VOSB protégés to enhance their capabilities to successfully perform contracts and subcontracts for VA. The program is designed to foster long term business relationships between SDVOSBs, VOSBs and prime contractors. We believe the goal to perform 50 percent of the work is consistent with other government-wide Mentor-Protégé Programs. The rationale for the requirement that the SDVOSB or VOSB perform 50 percent of the cost of the contract relates to the limitation on subcontracting requirements previously discussed in response to comment 15. Therefore, no change will be made to the rule based on this comment.

Comment: One commenter stated that proposed sections 815.304 and 852.215–70 should be revised to delete participation in the VA Mentor-Protégé Program as an evaluation factor when competitively negotiating the award of contracts, tasks, or delivery orders. The commenter stated that finding a mentor is a difficult and time consuming task that is of little value for start-up SDVOSBs. The commenter also stated that being in a mentor-protégé program does not provide additional competitive advantage any more than any other teaming arrangement, joint venture, or prime/subcontractor relationship. Finally, the commenter stated that the rule would give large businesses a back door into negotiations intended for small business through their protégé.

Response: We believe the use of participation in VA's Mentor-Protégé Program as an evaluation factor is consistent with the government-wide practice used in similar programs. Large business participation in the program is encouraged to assist SDVOSBs and VOSBs in successfully performing VA contracts and subcontracts and increasing their business. VA finds that the likelihood of any abuse of the program by large businesses is minimal. As addressed above, in small business set-asides conducted under this rule, the SDVOSB or VOSB must perform defined percentages of work. Therefore, for example, a large business subcontractor mentor cannot control the performance or management of a VA contract awarded under this rule. In unrestricted acquisitions where a large business mentor may be a prime contractor, VA has included evaluation criteria in solicitations to provide extra evaluation credit to the large business offeror to encourage support for VOSBs and SDVOSBs. Proposed section 815.304–70(a)(4) prescribed that VA contracting officers shall ''consider participation in VA's Mentor-Protégé Program as an evaluation factor when competitively negotiating the award of contracts or task orders or delivery orders.'' Because VA intended in the proposed rule that ''consider'' be mandatory, in this final rule the word ''consider'' is changed to ''use,'' which requires contracting officers to actively use a contractor's participation in the Mentor-Protégé Program as an evaluation factor and creates consistency with subsections (a)(2) and (a)(3) of this section. Also, the rule requires that VA ensure the large business actually utilizes the SDVOSB or VOSB that it proposes to use to ensure the integrity of the program.

17. Applicability to GSA Federal Supply Schedule (FSS) Procurements

Comment: VA received a comment stating that the proposed rule was unclear whether it was intended to be applicable to task and delivery orders under the Federal Supply Schedule (FSS). The commenter indicated that although GSA has delegated to VA the authority to administer certain schedules, the delegation does not extend to policy implementation. The commenter recommended a revision stating that SDVOSB and VOSB set-asides and sole source provisions do not apply at the FSS order level.

Response: We disagree with the commenter and reject the suggestion because this rule does not apply to FSS task or delivery orders. VA does not believe a change to the regulation is needed, and 48 CFR part 8 procedures in the FAR will continue to apply to VA FSS task/delivery orders. Further, VA will continue to follow GSA guidance regarding applicability of 48 CFR part 19 of the FAR, Small Business Programs, which states that set-asides do not apply to FAR part 8 FSS acquisitions.

Comment: Many commenters stated that the proposed rule should apply to FSS orders since VA purchases approximately 60 percent of its goods and services through the FSS. The commenters believed that to have the greatest impact, any policy designed to maximize the participation of SDVOSBs and VOSBs in VA's purchasing process should apply to purchases made pursuant to the FSS program. The commenters stated 48 CFR subpart 8.4 governs FSS contracts. Federal Acquisition Regulation (FAR) 8.404 states that 48 CFR parts 13, 14, 15, and 19 do not apply to blanket purchase agreements or orders placed against FSS contracts. The commenters stated that failure to apply the rule to orders made under FSS contracts would severely limit the rule's effectiveness.

Response: We disagree with these commenters. FSS contracts are governed by policy developed by GSA, which has determined that set-asides do not apply to FSS orders. VA has no authority to include set-aside procedures for FSS orders under this rule; however, VA provides evaluation preferences for SDVOSBs and VOSBs in the proposed rule as follows. GSA Acquisition Letter V–05–12, dated June 6, 2005, and FAR 8.405–1(c) provide guidance on evaluation factors that may be included in FSS orders when price is not the sole consideration for award. Socioeconomic status (meaning the type of small business) may be an evaluation factor for competitive delivery or task orders under the FSS. The rule requires inclusion of SDVOSB and VOSB status as an evaluation factor when competitively negotiating the award of contracts or task/delivery orders under FSS when price is not the sole basis for award. We are revising the rule to add section 808.405–2, Ordering procedures for services requiring a statement of work, which provides that when developing the statement of work and any evaluation criteria in addition to price the Government shall adhere to and apply the evaluation factor commitments in section 815.304–70.

18. Applicability to Interagency Agreements

Comment: One commenter stated the rule should apply to other government entities that award contracting vehicles for VA. The commenter stated acquisition personnel may circumvent this rule by having interagency agreements done outside of VA.

Response: We agree with this comment. The criteria for the applicability of this rule to interagency agreements are written in statute at 38 U.S.C. 8127(j). Under current law, any

contract, memorandum of understanding, agreement, or other arrangement with any governmental entity to acquire goods and services, shall include in the contract, memorandum, agreement, or other arrangement a requirement that the entity will comply, to the maximum extent feasible, with the provisions of 38 U.S.C. 8127 and 8128, as implemented in the VA Acquisition Regulations, when acquiring such goods or services. We are revising the rule to add a provision in section 817.502, which requires other governmental agencies performing purchases on behalf VA to comply with 38 U.S.C. 8127 and 8128 to the maximum extent feasible. The inclusion of this provision holds other agencies accountable to VA's order of priority for SDVOSBs and VOSBs when procuring services and supplies for VA pursuant to an interagency agreement.

19. Site Visits in the Verification Process

Comment: One commenter stated that mandatory site visits should not be used to verify the SDVOSB or VOSB status of companies. Instead, the commenter believes VA should rely on the veteran's disability rating letter as confirmation of their veteran status.

Response: Verification of VOSB status is governed by 38 CFR part 74, VA Veteran Owned Small Business Verification Guidelines. In accordance with 38 CFR 74.20(b), the VA Center for Veteran Enterprise may perform a site visit at the contractor's site. Site visits are not mandatory, but may be used in determining ownership and control of a business for verification purposes. This rulemaking did not propose to alter the current verification procedures. Accordingly, no changes will be made based upon the comment.

20. Government Printing Office (GPO)

Comment: One comment was received applauding the overall goals of the rule, but the commenter stated one section directly conflicts with section 501 of title 44, United States Code, which is the enabling statute for the GPO. The commenter stated that 38 U.S.C. 8128 allows VA to supersede other provisions of law concerning contracting preferences, but not mandates like the one contained in title 44. The commenter believes that VA has no authority to ignore the requirements of title 44 as to the expenditure of appropriated funds for printing through GPO. The commenter also stated that proposed section 808.803 is not VA's only means to implement 38 U.S.C. 8128.

Response: VA agrees with the commenter that there are other means by which VA can effectively implement 38 U.S.C. 8128. Therefore, VA will delete section 808.803. In the alternative, VA will negotiate a memorandum of agreement with GPO to foster greater business opportunities for and stronger outreach efforts to SDVOSBs and VOSBs, including, but not necessarily limited to, the following. First, VA shall seek to enhance its ability under GPO's Simplified Purchase Agreement (SPA) authority whereby, for publishing and information products and services up to $10,000, upon executing a SPA agreement with GPO, VA may solicit quotations from a database of all contractors who have been certified to participate in the SPA program and what type of products that they produce. VA may select qualified SDVOSBs and VOSBs or include criteria providing a preference for such firms in these acquisitions. Based on recent information from GPO, acquisitions under $10,000 amount to nearly 40 percent of VA's business with GPO. In addition, VA will work with GPO to enhance its outreach efforts to SDVOSBs and VOSBs by assisting GPO in modifying its internal policy directive(s) to add these socio-economic categories to the list of small businesses with whom GPO encourages contracting. Finally, VA will provide GPO with information about its Vendor Information Page at vetbiz.gov where VA maintains a list of veteran small businesses for research purposes. GPO will provide information regarding qualification requirements for contracting with GPO that VA may publish or link to on VA's small business website.

21. Past Performance Is an Evaluation Factor

Comment: One commenter recommended that any reference to past performance as an evaluation factor as indicated in section 815.304–70, not include specific past performance regarding the required services or goods for the agency issuing the solicitation. The commenter is concerned that if a contractor does not have a proven track record with the procuring agency, the contractor cannot effectively compete. The commenter suggests that if a SDVOSB or VOSB has experience with another government entity, then they should be allowed to compete. Further, the commenter expressed concern about solicitations being written in a manner to award projects to a known entity that has worked with the agency. The commenter stated this is an unfair and deceptive procurement practice.

Response: VOSBs and SDVOSBs are not precluded from using their past performance records while under contract with another agency. VA evaluates past performance in accordance with Federal Acquisition Regulation 15.305(a)(2)(ii)–(iv). VA contracting officers are required to evaluate past performance information regarding an offeror's past or current contracts with Federal, State, or local governments for efforts similar to VA's advertised requirement. Further, VA contracting officers may consider past performance information associated with predecessor companies, key personnel who have relevant experience, or subcontractors that will perform major or critical aspects of the requirement when such information is relevant to the current acquisition. If an offeror does not have a record of relevant past performance or if there is no past performance information available, the offeror may not be evaluated favorably or unfavorably on past performance. See 48 CFR 15.305(a)(2)(iv). Based on the foregoing, we disagree with the commenter's concern that VA's consideration of past performance may prejudice veterans that lack a proven past performance record. No change will be made to the rule because we do not believe the provision unduly affects competition between contractors on the basis of past performance.

22. Subcontracting Goals

Comment: One commenter stated that a provision should be added to proposed part 819, which states that the subcontracting goals must be higher for SDVOSBs and VOSBs than for other small business concerns. For example, the annual goals for SDVOSB and VOSB might be 10 percent and 7.5 percent respectively, followed by Section 8(a) at 5 percent and HubZone at 3 percent. Another commenter suggested that contracting officers should ensure that any subcontracting plans include a goal that is at least commensurate with the annual SDVOSB prime contracting goal for the total value of planned subcontracts.

Response: We believe the best practice is to negotiate the subcontracting goals based on the requirements of each discrete contract. The subcontracting goals should be set based on the nature of the requirement. It may be unrealistic to set mandatory goals applicable to all types of requirements. Furthermore, the goals for all other socioeconomic programs are set by statute and cannot be amended through this rulemaking process.

23. Eligibility for Participants in VA Mentor-Protégé Program

Comment: One commenter stated the rule should clarify the eligibility of mentors and protégés pursuant to the VA Mentor-Protégé Program. It is unclear whether a participating Mentor must be a prime contractor to its protégé. In proposed section 819.7102, a mentor is defined as a prime contractor that elects to promote and develop SDVOSB and/or VOSB subcontractors by providing developmental assistance designed to enhance the business success of the protégé. As defined in section 802.101, a protégé is defined as a SDVOSB or VOSB, which meets federal small business size standards in its primary NAICS code and is the recipient of developmental assistance pursuant to a mentor-protégé agreement. These definitions indicate the mentor must be the prime contractor and the protégé must be the subcontractor in an eligible mentor-protégé relationship. However, proposed section 819.7106 stated that protégés may participate in the program in pursuit of a prime contract or as a subcontractor under the mentor's prime contract with VA, but are not required to be a subcontractor to a VA prime contractor or be a VA prime contractor. The commenter states that the proposed rule should clarify that eligible mentors are not limited to act as prime contractors and eligible protégés are not limited to act as subcontractors.

Response: We concur with these comments and have made changes to clarify this matter. The word ''prime'' has been deleted from the definition of mentor in sections 819.7102 and 852.219–71(b)(1). In section 819.7102, ''SDVOSB and/or VOSB subcontractors'' is revised to indicate ''SDVOSBs and/or VOSBs.'' Section 819.7106(a), Eligibility, has been revised to state that a mentor may be either a large or small business entity or either a prime contractor or subcontractor.

24. Mentor-Protégé Agreement Approval

Comment: One commenter stated that VA's Office of Small and Disadvantaged Business Utilization (OSDBU) should have the approval authority for VA Mentor-Protégé Agreements. The commenter stated that OSDBU is genuinely suited to meet this initiative.

Response: We agree with this comment and note that section 819.7108 clearly indicates that VA Mentor-Protégé Agreements must be submitted to VA OSDBU for review and approval.

25. Training and Guidance to VA Contracting Officers

Comment: Several commenters suggested that VA contracting officers receive training and specific guidance regarding implementation of VA's Veterans First Contracting Program to ensure it is implemented effectively. Some commenters wanted to ensure that contracting officers at the local level are accountable for implementing the rule. Others voiced concern about the use of the Prime Vendor Program instead of SDVOSBs and VOSBs.

Response: VA provides extensive training to acquisition professionals, program managers/officials, and purchase card holders. In addition, VA's OSDBU enhances this training by serving as expert advisors for any questions about the process and expends significant effort to market the statutory changes to VA contracting officers as well as VA's industry partners. VA will continue to provide ongoing training to its acquisition professionals to ensure that VA's Veterans First Contracting Program is fully understood. No change to the rule is required based on this comment.

26. Determination of Affiliation

Comment: One commenter stated that unless specified, SBA may classify participants in a Mentor-Protégé Program as a joint venture. The commenter notes that SBA states on its website that it excludes its Section 8(a) program from joint ventures. The commenter stated that if the affiliation definition is not clarified, VA's Veterans First Contracting Program would be negatively impacted.

Response: We do not believe that this needs to be addressed any further in the rule. Section 819.7103 states that a protégé firm is not considered an affiliate of a mentor firm based solely on the fact the protégé firm is receiving developmental assistance from the mentor firm under the VA Mentor-Protégé Program. The determination of affiliation is a SBA function; therefore, no clarification will be made to the rule.

27. Mentor Protégé Relationships Subject to Joint Venture Restrictions

Comment: One commenter stated given the SBA's definition of joint venture, it could be argued that participants in the Mentor-Protégé Program that are classified as a joint venture, either by their own agreement or by the SBA, would fall into the joint venture restrictions such as three bids in 2 years and the 51 percent to 49 percent work and investment. The commenter stated further that it is not the intent of the Mentor-Protégé Program to be restricted by the joint venture guidelines.

Response: A joint venture is an association of individuals and/or concerns with interests in any degree or proportion by way of contract, express or implied, for which purpose they combine their efforts, property, money, skill, or knowledge, but not on a continuing or permanent basis for conducting business generally. 38 CFR 74.1. First, section 819.7003 provides that a protégé firm will not be considered an affiliate of the mentor solely on the basis that the protégé is receiving assistance from the mentor under VA's Mentor-Protégé program. Further, SBA regulations on mentor-protégé arrangements also provide that a protégé firm is not an affiliate of a mentor firm solely because the protégé firm receives assistance from the mentor firm under other Federal Mentor-Protégé programs. *See* 13 CFR 121.103(b)(6). Affiliation is an important issue because it means that the size status of the two or more businesses included in the joint venture arrangement are combined to determine small business size status of the vendor. Since section 819.7003 provides that mentor-protégé participants will not be subject to a size status determination that combines the joint ventures' size solely on the basis of the mentor-protégé relationship they have established, the commenter's concern is unfounded. No change will be made to the final rule based on this comment. VA has noted that on October 28, 2009, SBA published in the **Federal Register** a proposed rule to amend § 121.103(b)(6) to limit the exclusion from affiliation to ''a Federal Mentor-Protégé program where an exception to affiliation is specifically authorized by statute or by SBA under procedures set forth in § 121.903.'' 74 FR 55694.

28. Debarment Time Limits

Comment: One commenter recommended a minimum of 2 years and a maximum of 5 years debarment for any business that willfully or deliberately misrepresents ownership and control of the business for purposes of registering in the VetBiz.gov Vendor Information Pages database or other Federal databases.

Response: Debarment time periods are inherently discretionary in nature. In accordance with guidance in Federal Acquisition Regulation 9.406, debarment shall be for a period commensurate with the seriousness of the cause(s) but generally not to exceed 3 years. VA has taken a harder stance in this proposed rule. For example, misrepresenting veteran small business

status could result in debarment for up to a maximum of 5 years. However, we believe imposing a mandatory minimum debarment period in this rule would diminish VA's discretion because the period of debarment should be commensurate with the violation based upon findings in administrative proceedings required for debarment actions. Therefore, no change will be made to the rule based on the comment.

29. Causes for Debarment

Comment: Several comments recommended adding to proposed section 809.406–2, Causes for Debarment, misrepresentation of status as an SDVOSB/VOSB, debarment of large businesses that are used as a subcontractor that actually do more than 50 percent of the labor, including supervision of the project, as well as any SDVOSB that is a party to such action.

Response: We appreciate the comments and believe that expansion of the proposed debarment actions for violating subcontracting limitations is viable. Accordingly, we will revise the rule to add that violations of the limitation on subcontracting requirements under subpart 819.70 may result in the debarment of any large business concern and SDVOSB or VOSB concern that deliberately violates the small business subcontracting clause.

30. Market Research

Comment: One commenter stated that proposed section 810.001 should be revised to require VA contracting teams to use the VIP database as their first means of performing market research, in addition to other sources of information.

Response: We believe the existing language in proposed section 810.001 satisfies the commenter's suggestion and makes clear that VA contracting teams will utilize the VIP database, as well as other sources of information. Therefore, no change will be made to the rule.

31. Requirement for Mentors To Submit Subcontracting Plan

Comment: One commenter was concerned that under the Mentor-Protégé Program, mentors would be excused from the requirement to submit subcontracting plans for its largest federal procurement opportunities with VA or other agencies, citing the VA Mentor Protégé Program as its reason for noncompliance.

Response: We believe that the existing language in section 819.7105 indicates that mentors must continue to file subcontracting plans. No change will be made to the rule based on the comment.

32. SDVOSB/VOSB Small Business Status Protests

At section 819.307 of the proposed rule, VA included a provision that VA would utilize SBA to consider and decide SDVOSB and VOSB status protests. This requires VA and SBA to execute an interagency agreement pursuant to the Economy Act, 31 U.S.C. 1535. Negotiations of this interagency agreement have not yet been finalized. Therefore, VA has amended section 819.307 with an interim rule to provide that VA's Executive Director, OSDBU shall consider and decide SDVOSB and VOSB status protests, and provides procedures there for, until such time as the interagency agreement is executed by the agencies. VA hereby solicits comments on this regulatory amendment only. Furthermore, 819.307 is also revised to clarify that VA regulations at 38 CFR Part 74, regarding the issues of ownership and control of SDVOSB and VOSBs, shall apply to status protests for procurements under Subpart 819.70 and that, otherwise, the procedures of FAR Part 19.307 shall apply to both VOSB and SDVOSB status protests; however, VA contracting officers shall be solely responsible for ensuring SDVOSB and VOSB compliance with the requirement to be listed on the Vendor Information Pages at VetBiz.gov in accordance with section 804.1102. Lastly, 819.307 is clarified to explain that if a SDVOSB or VOSB status protest is granted, if contract award has already been made, VA will not be required to terminate the award but will not be able to count that award towards its small business accomplishments, which is consistent with current Government Accountability Office protest decisions on similar matters.

Administrative Procedure Act

This document additionally revises section 819.307, SDVOSB/VOSB Small Business Status Protests, of the proposed rule, where VA provided that VA would utilize the SBA to consider and decide SDVOSB and VOSB status protests. This requires VA and SBA to execute an interagency agreement pursuant to the Economy Act, 31 U.S.C. 1535. Negotiations of this interagency agreement have not yet been finalized. Therefore, VA has amended section 819.307 with an interim rule to provide that VA's Executive Director, OSDBU shall consider and decide SDVOSB and VOSB status protests, and provides procedures there for, until such time as the interagency agreement is executed by the agencies. Good cause exists for the agency to include this change as an interim rule because it is essential for this contracting program to function. Without a SDVOSB/VOSB status protest resolution process in place for acquisitions under this authority, performance of any contract award so challenged would be suspended thus depriving VA and veterans of necessary services and/or supplies. VA hereby solicits comments on this regulatory amendment only.

Other Non-Substantive Changes

The changes below serve to clarify particular items from the proposed rule in this final rule.

Section 802.101 has been revised to state that the term ''small business concern'' has the same meaning as in Federal Acquisition Regulation 2.101.

The proposed rule contained a provision at sections 819.7007(b) and 819.7008(b) indicating no protest is authorized in connection with the issuance or proposed issuance of a contract under this section, on the basis that more than one SDVOSB or VOSB, respectively, is available to meet the requirement. In the proposed rule, VA sought to remove this question as an issue subject to protest. Upon further consideration, VA has determined that it is not legally proper to affect protest jurisdiction established by 31 U.S.C. 3551 *et seq.* or 28 U.S.C. 1491 by this rule. In addition, these provisions are being removed in the final rule to provide the added benefit of transparency of the procurement process.

In the proposed rule it was stated in section 819.7109(b) that OSBDU would forward copies of approved Mentor-Protégé Agreements to the VA contracting officer for any VA contracts affected by that Agreement. Section 819.7109(b) is revised in the final rule to state that approved Mentor-Protégé Agreements will be posted on a VA Web site, which will be accessible to VA contracting officers for their review. This change is being made to more efficiently use the resources that are available and to increase the transparency of VA's procurement process. Electronic posting of agreements obviates the need to forward paper copies of the agreements to VA contracting officers and makes the agreements more accessible to contracting officers.

Regulatory Flexibility Act

VA has determined that this rule establishing priority to small business concerns owned and controlled by veterans may have a significant economic impact on a substantial number of small entities within the

meaning of the Regulatory Flexibility Act (RFA), 5 U.S.C. 601, *et seq.* Accordingly, VA prepared an Initial Regulatory Flexibility Analysis (IRFA) addressing the impact of the proposed rule in accordance with 5 U.S.C. 603. The IRFA examined the objectives and legal basis for the proposed rule; the kind and number of small entities that may be affected; the projected recordkeeping, reporting, and other requirements; whether there were any federal rules that may duplicate, overlap, or conflict with the proposed rule; and whether there were any significant alternatives to the proposed rule.

VA's Final Regulatory Flexibility Analysis (FRFA) is set forth below*:*

1. What are the reasons for, and objectives of, this final rule?

Sections 502 and 503 of Public Law 109–461 require VA to create a unique acquisition program among Federal agencies that permits preferences for SDVOSBs and VOSBs. This final rule will permit VA contracting officers to conduct acquisition actions with preferences for SDVOSBs or VOSBs. Specifically, this final rule will allow VA contracting officers to:

a. Under certain conditions, permit other than competitive procedures under the simplified acquisition threshold with SDVOSBs or VOSBs;

b. Require set-asides for SDVOSBs or VOSBs above the simplified acquisition threshold when the contracting officer has a reasonable expectation that two or more eligible SDVOSBs or VOSBs will submit offers and that the award can be made at a fair and reasonable price that offers the best value to the United States;

c. Under certain conditions, permit other than competitive sourcing for SDVOSBs or VOSBs above the simplified acquisition threshold when the contracting officer determines that a fair and reasonable price will be obtained as a result of negotiations for requirements not to exceed $5 million;

d. Include evaluation factors in negotiated acquisitions and FSS acquisitions that give preference to SDVOSBs and VOSBs and preference to offerors who propose to include such businesses as subcontractors;

e. Require offerors who propose to use SDVOSBs or VOSBs as subcontractors to use eligible businesses;

f. Require VOSBs participating in the Department's acquisitions to register in the VetBiz.gov VIP database and VA verify that the business meets eligibility requirements;

g. Establish a VA Mentor-Protégé Program and give large businesses that participate in the program a preference in the award of VA prime contracts;

h. Encourage prime contractors and mentors to assist SDVOSBs and VOSBs in obtaining bonding when required;

i. Recommend debarment of any business that misrepresents ownership and control of the business for purposes of registering in the VetBiz.gov VIP database or other Federal databases; and

j. Under certain conditions, acquire supplies and services from SDVOSBs and VOSBs in lieu of FPI.

2. Summary of the Significant Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis, a Summary of the Assessment of the Agency of Such Issues, and a Statement of any Changes Made as a Result of Such Comments.

VA has set forth an analysis of the public comments on the Proposed Rule in the supplementary information section of this final rule. VA received one comment in response to the IRFA. The commenter, an SDVOSB owner, urged VA to maintain the economic categories and keep constant the number of contracts awarded to certified HUBZone, 8(a), and woman-owned small business (WOSB) concerns. The commenter stated that the increase of contracts to SDVOSB/VOSBs under the Veterans First rule should come at the expense of the 65-percent allocated for large businesses and not the 35-percent for small businesses. The Veterans First rule does provide a priority for SDVOSB/VOSBs over other small business concerns and implements a new small business set-aside authority for SDVOSB/VOSBs. The underlying statutory authority for this rule does not authorize VA to provide that all awards to SDVOSB/VOSBs come solely at the expense of large businesses. Therefore, VA believes that the IRFA analysis was accurate.

3. What is VA's description and estimate of the number of small entities to which the rule will apply?

The RFA directs agencies to provide a description, and where feasible, an estimate of the number of small business concerns that may be affected by the rule. It is difficult to estimate the number of concerns that will participate in this program because there is insufficient data on SDVOSBs or VOSBs that are ready and able to perform on VA requirements. To establish the likely number of SDVOSBs or VOSBs that may benefit from VA's unique procurement authority, there are two principal data sources: VA's VetBiz.gov VIP database and the Central Contractor Registration (CCR) database. VA maintains a list of veteran small businesses in its VetBiz.gov VIP database. A VIP query returned 15,904 VOSBs, including 9,020 SDVOSBs. The VIP database requires that businesses answer eligibility questions before they are permitted to register their business. VA finds that these searches reasonably represent the number of SDVOSBs and VOSBs that may be affected by the rule.

The CCR is a self-representation database where small businesses are responsible for identifying their size and socio-economic status. A CCR Dynamic Small Business Search query conducted on March 6, 2009, returned 43,273 VOSBs, including 14,093 SDVOSBs.

Under this final rule, VA contracting teams will be required to give priority consideration to SDVOSBs and VOSBs when using other contracting programs, like set-asides for the Historically Underutilized Business (HUB) Zone Program or the Section 8(a) Business Development Program reserved actions or the Small Business Set-aside Program. A CCR Dynamic Small Business Search conducted on March 6, 2009, returned 10,697 active HUBZone firms. Of this population, 1,961, or 18 percent, are also VOSBs. A search of active Section 8(a) businesses identified 9,385 current firms, which includes 1,267 VOSBs, or 13.5 percent of the total population. There are 69,865 woman-owned small businesses (WOSBs) in the CCR, of which 4,419 appear to also be VOSBs. VA notes that SBA is in the process of establishing a WOSB Set-aside Program, making the percentage of WOSBs who are also VOSBs eligible of interest to the Department.

Based on this unique procurement authority, VA believes the final rule will be small business neutral and that teams will organize with different lead parties. VA has a long tradition of performing well with small business programs. In July 2008, SBA certified the performance data for fiscal year (FY) 2007. In a report which appears on SBA's Web site, ''FY 2007 Small Business Goaling Report,'' VA reported the following actions, dollars and percentages of total procurement with small business programs:

- Small Business Actions: 2,506,303; Small Business Dollars: $3,854,687,943.57; Percentage of Total Procurement: 32.85.
- VOSB Actions: 399,541; VOSB Dollars: $1,216,580,370.73; Percentage of Total Procurement: 10.37.
- SDBVOSB Actions: 51,304; SDVOSB Dollars: $831,811,813.84; Percentage of Total Procurement: 7.09.
- Small Disadvantaged Business (SDB) Actions: 89,767; SDB Dollars: $1,029,410,495.34; Percentage of Total Procurement: 8.77.

• Section 8(a) Business Development Program Actions: 4,352; Section 8(a) Dollars: $450,897,322.73; Percentage of Total Procurement: 3.84.
• WOSB Actions: 260,491; WOSB Dollars: $583,657,495.86; Percentage of Total Procurement: 4.97.
• HUBZone Actions: 171,540; HUBZone Dollars: $388,439,407.06; Percentage of Total Procurement: 3.31.

As noted above, only a small percentage of veterans own small businesses. With this new procurement authority, additional businesses may be opened by veterans seeking to participate in the sole source or set-aside procurement actions. More likely, VOSBs not currently in the Federal market may be expected to explore selling to VA. Thus, the population of known VOSBs may increase as these businesses register in the VetBiz.gov VIP database. This growth is necessary as section 502 of Public Law 109–461 also requires that VA's large prime contractors use eligible businesses to receive subcontracting program credit for VOSBs and SDVOSBs. With respect to who will benefit from this regulation, VA believes that SDVOSBs and VOSBs and the Department will benefit from the greater flexibility to contract with veterans in business, enhancing their unique relationship with VA.

4. What Are the Projected Reporting, Recordkeeping, Paperwork Reduction Act and Other Compliance Requirements?

There are two categories of coverage in this final rule that could potentially require the collection of information from contractors. VA will ask prime contractors who seek a preference for subcontracting with SDVOSBs or VOSBs to provide information about the identity of SDVOSBs or VOSBs, the approximate dollar value of the proposed subcontracts, and confirmation that the proposed subcontractors are eligible SDVOSBs or VOSBs as verified by the VetBiz.gov VIP database. VA also will collect information from participants in VA's Mentor-Protégé Program, to include the program agreement, developmental plan, and reports on the success of the program.

5. Description of the Steps VA Has Taken To Minimize the Significant Economic Impact on Small Entities Consistent With the Stated Objectives of Applicable Statutes, Including a Statement of the Factual, Policy, and Legal Reasons for Selecting the Alternative Adopted in the Final Rule.

This final rule is designed to benefit SDVOSBs and VOSBs. There are no alternatives which would accomplish the stated objectives of sections 502 and 503 of Public Law 109–461 to give contracting priority to SDVOSBs and VOSBs.

Executive Order 12866

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). The Executive Order classifies a ''significant regulatory action,'' requiring review by the Office of Management and Budget (OMB) unless OMB waives such review, as any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

The economic, interagency, budgetary, legal, and policy implications of this final rule have been examined, and it has been determined to be a significant regulatory action under Executive Order 12866 because it is likely to result in a rule that may raise novel legal or policy issues arising out of legal mandates, the President's priorities, or principles set forth in the Executive Order.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995, at 2 U.S.C. 1532, requires that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in an expenditure by state, local, or tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any given year. This rule would have no such effect on state, local, or tribal governments, or on the private sector.

Paperwork Reduction Act

This final rule contains provisions in VAAR sections 819.7108 and 819.7113 that constitute collections of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521). OMB has approved the proposed collections and has assigned control number 2900–0723 to them.

List of Subjects

48 CFR Parts 802, 804, 808, 809, 810, 813, 815, and 817

Government procurement, Reporting and recordkeeping requirements, Utilities.

48 CFR Part 819

Administrative practice and procedure, Government procurement, Reporting and recordkeeping requirements, Small business, Veterans.

48 CFR Part 828

Government procurement, Insurance, Surety bonds.

48 CFR Part 852

Government procurement, Reporting and recordkeeping requirements.

Approved: August 25, 2009.

John R. Gingrich,

Chief of Staff, Department of Veterans Affairs.

■ For the reasons stated in the preamble, the Department of Veterans Affairs amends 48 CFR Chapter 8 as follows:

CHAPTER 8—DEPARTMENT OF VETERANS AFFAIRS

Subchapter A—General

PART 802—DEFINITIONS OF WORDS AND TERMS

■ 1. The authority citation for part 802 is revised to read as follows:

Authority: 38 U.S.C. 8127 and 8128; 40 U.S.C. 121(c) and (d); and 48 CFR 1.301–1.304.

■ 2. Amend section 802.101 by adding in alphabetical order the following terms:

802.101 Definitions.

* * * * *

Service-disabled veteran-owned small business concern (SDVOSB) has the same meaning as defined in the Federal Acquisition Regulation (FAR) part 2.101, except for acquisitions authorized by 813.106 and subpart 819.70. These businesses must then be listed as verified on the Vendor Information Pages (VIP) database at *http://www.vetbiz.gov.* In addition, some businesses may be owned and controlled by a surviving spouse.

* * * * *

Small business concern has the same meaning as defined in FAR 2.101.

Surviving spouse means an individual who has been listed in the Department of Veterans Affairs' (VA) Veterans

Benefits Administration (VBA) database of veterans and family members. To be eligible for inclusion in the VetBiz.gov VIP database, the following conditions must apply:

(1) If the death of the veteran causes the small business concern to be less than 51 percent owned by one or more service-disabled veterans, the surviving spouse of such veteran who acquires ownership rights in such small business shall, for the period described below, be treated as if the surviving spouse were that veteran for the purpose of maintaining the status of the small business concern as a service-disabled veteran-owned small business.

(2) The period referred to above is the period beginning on the date on which the veteran dies and ending on the earliest of the following dates:

(i) The date on which the surviving spouse remarries;

(ii) The date on which the surviving spouse relinquishes an ownership interest in the small business concern;

(iii) The date that is 10 years after the date of the veteran's death; or

(iv) The date on which the business concern is no longer small under federal small business size standards.

(3) The veteran must have had a 100 percent service-connected disability rating or the veteran died as a direct result of a service-connected disability.

* * * * *

Vendor Information Pages (VIP) means the VetBiz.gov Vendor Information Pages database at *http://www.vetbiz.gov.*

Veteran-owned small business concern (VOSB) has the same meaning as defined in FAR 2.101, except for acquisitions authorized by 813.106 and 819.70. These businesses must then be listed as verified in the VetBiz.gov VIP database.

* * * * *

PART 804—ADMINISTRATIVE MATTERS

■ 3. The authority citation for part 804 is revised to read as follows:

Authority: 38 U.S.C. 8127 and 8128; 40 U.S.C. 121(c) and (d); and 48 CFR 1.301–1.304.

■ 4. Add section 804.1102 to read as follows:

804.1102 Vendor Information Pages (VIP) Database

Prior to January 1, 2012, all VOSBs and SDVOSBs must be listed in the VIP database, available at *http://www.VetBiz.gov,* and also must be registered in the Central Contractor Registration (CCR) (*see* 48 CFR subpart 4.11) to receive contract awards under VA's Veteran-owned Small Business prime contracting and subcontracting opportunities program. After December 31, 2011, all VOSBs, including SDVOSBs, must be listed as verified in the VIP database, and also must be registered in the CCR to be eligible to participate in order to receive new contract awards under this program.

PART 808—REQUIRED SOURCES OF SUPPLIES AND SERVICES

■ 5. The authority citation for part 808 is revised to read as follows:

Authority: 38 U.S.C. 8127 and 8128; 40 U.S.C. 121(c) and (d); and 48 CFR 1.301–1.304.

■ 6. Section 808.405–2 is added to read as follows:

808.405–2 Ordering procedure for services requiring a statement of work.

When placing an order or establishing a BPA for supplies or services requiring a statement of work, the ordering activity, when developing the statement of work and any evaluation criteria in addition to price, shall adhere to and apply the evaluation factor commitments at 815.304–70.

■ 7. Add subpart 808.6 consisting of section 808.603 to read as follows:

Subpart 808.6—Acquisition From Federal Prison Industries, Inc. (FPI)

808.603 Purchase Priorities

Contracting officers may purchase supplies and services produced or provided by FPI from eligible service-disabled veteran-owned small businesses and veteran-owned small businesses, in accordance with procedures set forth in subpart 819.70, without seeking a waiver from FPI, in accordance with 38 U.S.C. 8128, Small business concerns owned and controlled by veterans: Contracting priority.

PART 809—CONTRACTOR QUALIFICATIONS

■ 8. The authority citation for part 809 is revised to read as follows:

Authority: 38 U.S.C. 8127 and 8128; 40 U.S.C. 121(c) and (d); and 48 CFR 1.301–1.304.

■ 9. Add section 809.406–2 to read as follows:

809.406–2 Cause for debarment.

(a) Misrepresentation of VOSB or SDVOSB eligibility may result in action taken by VA officials to debar the business concern for a period not to exceed 5 years from contracting with VA as a prime contractor or a subcontractor.

(b) Any deliberate violation of the limitation on subcontracting clause requirements for acquisitions under subpart 819.70 may result in action taken by VA officials to debar any service-disabled veteran-owned, veteran-owned small business concern or any large business concern involved in such action.

■ 10–12. Part 810 is added to read as follows:

PART 810—MARKET RESEARCH

Authority: 38 U.S.C. 8127 and 8128; 40 U.S.C. 121(c) and (d); and 48 CFR 1.301–1.304.

810.001 Market research policy.

When conducting market research, VA contracting teams shall use the VIP database, at *http://www.VetBiz.gov*, in addition to other sources of information.

810.002 Market research procedures.

Contracting officers shall record VIP queries in the solicitation file by printing the results of the search(s) along with specific query used to generate the search(s).

PART 813—SIMPLIFIED ACQUISITION PROCEDURES

■ 13. The authority citation for part 813 is revised to read as follows:

Authority: 38 U.S.C. 8127 and 8128; 40 U.S.C. 121(c) and (d); and 48 CFR 1.301–1.304.

■ 14. Revise section 813.106 to read as follows:

813.106 Soliciting competition, evaluation of quotations or offers, award and documentation.

(a) Contracting officers may use other than competitive procedures to enter into a contract with a SDVOSB or VOSB when the amount exceeds the micro-purchase threshold up to $5 million.

(b) Requirements exceeding $25,000 must be synopsized in accordance with FAR Part 5.

■ 15. Add subpart 813.2, consisting of section 813.202, to read as follows:

Subpart 813.2—Actions at or Below the Micro-Purchase Threshold

813.202 Purchase guidelines.

Open market micro-purchases shall be equitably distributed among all qualified SDVOSBs or VOSBs, respectively, to the maximum extent practicable.

PART 815—CONTRACTING BY NEGOTIATION

■ 16. The authority citation for part 815 is revised to read as follows:

Authority: 38 U.S.C. 8127 and 8128; 40 U.S.C. 121(c); and 48 CFR 1.301–1.304.

■ 17. Add section 815.304 to read as follows:

815.304 Evaluation factors and significant subfactors.

(a) In an effort to assist SDVOSBs and VOSBs, contracting officers shall include evaluation factors providing additional consideration to such offerors in competitively negotiated solicitations that are not set aside for SDVOSBs or VOSBs.

(b) Additional consideration shall also be given to any offeror, regardless of size status, that proposes to subcontract with SDVOSBs or VOSBs.

■ 18. Add section 815.304–70 to read as follows:

815.304–70 Evaluation factor commitments.

(a) VA contracting officers shall:

(1) Include provisions in negotiated solicitations giving preference to offers received from VOSBs and additional preference to offers received from SDVOSBs;

(2) Use past performance in meeting SDVOSB subcontracting goals as a non-price evaluation factor in selecting offers for award;

(3) Use the proposed inclusion of SDVOSBs or VOSBs as subcontractors as an evaluation factor when competitively negotiating the award of contracts or task or delivery orders; and

(4) Use participation in VA's Mentor-Protégé Program as an evaluation factor when competitively negotiating the award of contracts or task or delivery orders.

(b) If an offeror proposes to use an SDVOSB or VOSB subcontractor in accordance with 852.215–70, Service-Disabled Veteran-Owned and Veteran-Owned Small Business Evaluation Factors, the contracting officer shall ensure that the offeror, if awarded the contract, actually does use the proposed subcontractor or another SDVOSB or VOSB subcontractor for that subcontract or for work of similar value.

■ 19. Add section 815.304–71 to read as follows:

815.304–71 Solicitation provision and clause

(a) The contracting officer shall insert the provision at 852.215–70, Service-Disabled Veteran-Owned and Veteran-Owned Small Business Evaluation Factors, in competitively negotiated solicitations that are not set aside for SDVOSBs or VOSBs.

(b) The contracting officer shall insert the clause at 852.215–71, Evaluation Factor Commitments, in solicitations and contracts that include VAAR clause 852.215–70, Service-Disabled Veteran-Owned and Veteran-Owned Small Business Evaluation Factors.

PART 817—SPECIAL CONTRACTING METHODS

■ 20. The authority citation for part 817 is added to read as follows:

Authority: 38 U.S.C. 8127.

■ 21. Add *subpart 817.5 consisting of* section 817.502 to read as follows:

Subpart 817.5—Interagency Acquisitions Under the Economy Act

817.502 General

(a) After December 31, 2008, any contract, memorandum of understanding, agreement, or other arrangement with any governmental entity to acquire goods and services, shall include in such contract, memorandum, agreement, or other arrangement a requirement that the entity will comply, to the maximum extent feasible, with the provisions of 38 U.S.C. 8127 and 8128, as implemented by the VA Acquisition Regulation, in acquiring such goods or services.

(b) Nothing in this subsection shall be construed to supersede or otherwise affect the authorities provided under the Small Business Act (15 U.S.C. 631 *et seq.*).

PART 819—SMALL BUSINESS PROGRAMS

■ 22. The authority citation for part 819 is revised to read as follows:

Authority: 38 U.S.C. 8127 and 8128; 40 U.S.C. 121(c) and (d); 48 CFR 1.301–1.304; and 15 U.S.C. 637(d)(4)(E).

■ 23. Revise section 819.201 to read as follows:

819.201 General policy

The Secretary shall establish goals for each fiscal year for participation in Department contracts by SDVOSBs and VOSBs. In order to establish contracting priority for veteran-owned and controlled small businesses in accordance with 38 U.S.C. 8128, the Secretary may decrease other status-specific small business goals set forth by section 15(g)(1) of the Small Business Act (15 U.S.C. 644(g)(1)) upon consultation with the Administrator of the U.S. Small Business Administration (SBA).

■ 24. Add subpart 819.3 consisting of section 819.307 to read as follows:

Subpart 819.3—Determination of Small Business Status for Small Business Programs

819.307 SDVOSB/VOSB Small Business Status Protests

(a) All protests relating to whether an eligible VOSB or SDVOSB is a ''small'' business for the purposes of any Federal program are subject to 13 CFR Part 121 and must be filed in accordance with that part. For acquisitions under the authority of subpart 819.70, upon execution of an interagency agreement between VA and the SBA pursuant to the Economy Act (31 U.S.C. 1535), regarding service-disabled veteran-owned or veteran-owned small business status, contracting officers shall forward all status protests to the Director, Office of Government Contracting (D/GC), U.S. Small Business Administration (ATTN: VAAR Part 819 SDVOSB/VOSB Small Business Status Protests), 409 3rd Street, SW., Washington, DC 20416, for disposition. Except for ownership and control issues to be determined in accordance with 38 CFR Part 74, protests shall follow the procedures set forth in FAR 19.307 for both service-disabled veteran-owned and veteran-owned small business status. However, contracting officers shall be solely responsible for determining VOSB and SDVOSB compliance with VAAR 804.1102.

(b) If SBA sustains a service-disabled veteran-owned or veteran-owned small business status protest and the contract has already been awarded, then the contracting officer cannot count the award as an award to a VOSB or SDVOSB and the concern cannot submit another offer as a VOSB or SDVOSB on a future VOSB or SDVOSB procurement under this part, as applicable, unless it demonstrates to VA that it has overcome the reasons for the determination of ineligibility.

(c) Until execution of the interagency agreement referenced in subsection (a), for acquisitions under the authority of subpart 819.70, the Executive Director, VA Office of Small and Disadvantaged Business Utilization (OSDBU) shall decide all protests on service-disabled veteran-owned or veteran-owned small business status whether raised by the contracting officer or an offeror. Ownership and control shall be determined in accordance with 38 CFR Part 74. The Executive Director's decision shall be final.

(1) All protests must be in writing and must state all specific grounds for the protest. Assertions that a protested

concern is not a service-disabled veteran-owned or veteran-owned small business concern, without setting forth specific facts or allegations, are insufficient. An offeror must submit its protest to the contracting officer. An offeror must deliver their protest in person, by facsimile, by express delivery service, or by the U.S. Postal Service within the applicable time period to the contracting officer.

(2) An offeror's protest must be received by close of business on the fifth business day after bid opening (in sealed bid acquisitions) or by close of business on the fifth business day after notification by the contracting officer of the apparently successful offeror (in negotiated acquisitions). Any protest received after these time limits is untimely. Any protest received prior to bid opening or notification of intended award, whichever applies, is premature and shall be returned to the protester.

(3) If the Executive Director sustains a service-disabled veteran-owned or veteran-owned small business status protest and the contract has already been awarded, then the contracting officer cannot count the award as an award to a VOSB or SDVOSB and the concern cannot submit another offer as a VOSB or SDVOSB on a future VOSB or SDVOSB procurement under this part, as applicable, unless it demonstrates to VA that it has overcome the reasons for the determination of ineligibility.

■ 25–27. Add subpart 819.7 consisting of sections 819.704, 819.705, and 819.709 to read as follows:

Subpart 819.7—The Small Business Subcontracting Program

819.704 Subcontracting plan requirements.

(a) The contracting officer shall ensure that any subcontracting plans submitted by offerors include a goal that is at least commensurate with the annual VA SDVOSB prime contracting goal for the total value of planned subcontracts.

(b) The contracting officer shall ensure that any subcontracting plans submitted by offerors include a goal that is at least commensurate with the annual VA VOSB prime contracting goal for the total value of all planned subcontracts.

(c) VA's OSDBU shall review all prime contractor's subcontracting plan achievement reports to ensure that, in the case of a subcontract that is counted for purposes of meeting a goal in accordance with subparagraphs (a) and (b) of this section, the subcontract was actually awarded to a business concern that is eligible to be counted toward meeting the goal, as provided in 804.1102.

819.705 Appeal of Contracting Officer Decisions.

(a) Acquisitions not exceeding the simplified acquisition threshold (SAT) and 819.7007 and 819.7008 are excluded from this section.

(b) When an interested party intends to appeal a contracting officer's decision to not use the set-aside authority contained in subpart 819.70, the party shall notify the contracting officer, in writing, of its intent to challenge the decision. The contracting officer has 5 working days to reply to the challenge by either revising the strategy or indicating the rationale for not setting-aside the requirement. Upon receipt of the decision, the interested party may appeal to the Head of the Contracting Activity (HCA). Such appeal shall be filed within 5 working days of receipt of the contracting officer's decision. The HCA has 5 working days to respond to the appeal. The contracting officer shall suspend action on the acquisition unless the HCA makes a written determination that urgent circumstances exist which would significantly affect the interests of the government. The decision of the HCA shall be final.

(c) Prime contractors submitting businesses declared ineligible for credit in SDVOSB and/or VOSB subcontracting plans may appeal to the Executive Director, Office of Small and Disadvantaged Business Utilization and Center for Veterans Enterprise (00VE), U.S. Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, within 5 working days of receipt of information declaring their subcontractor ineligible. The Executive Director shall have 5 working days to respond. The decision of the Executive Director may be appealed to the Senior Procurement Executive (SPE) within 5 working days. The SPE shall have 15 working days to respond and that decision shall be final.

819.709 Contract clause.

The contracting officer shall insert VAAR clause 852.219–9, Small Business Subcontracting Plan Minimum Requirements, in solicitations and contracts that include FAR clause 52.219–9, Small Business Subcontracting Plan.

■ 28. Revise subpart 819.70 to read as follows:

Subpart 819.70—Service-Disabled Veteran-Owned and Veteran-Owned Small Business Acquisition Program

Sec.

819.7001 General.

(a) Sections 502 and 503 of the Veterans Benefits, Health Care, and Information Technology Act of 2006 (38 U.S.C. 8127–8128), created an acquisition program for small business concerns owned and controlled by service-disabled veterans and those owned and controlled by veterans for VA.

(b) The purpose of the program is to provide contracting assistance to SDVOSBs and VOSBs.

819.7002 Applicability.

This subpart applies to VA contracting activities and to its prime contractors. Also, this subpart applies to any government entity that has a contract, memorandum of understanding, agreement, or other arrangement with VA to acquire goods and services for VA in accordance with 817.502.

819.7003 Eligibility.

(a) Eligibility of SDVOSBs and VOSBs continues to be governed by the Small Business Administration regulations, 13 CFR subparts 125.8 through 125.13, as well as the FAR, except where expressly directed otherwise by the VAAR, and 38 CFR verification regulations for SDVOSBs and VOSBs.

(b) At the time of submission of offer, the offeror must represent to the contracting officer that it is a—

(1) SDVOSB concern or VOSB concern;

(2) Small business concern under the North American Industry Classification System (NAICS) code assigned to the acquisition; and

(3) Verified for eligibility in the VIP database.

(c) A joint venture may be considered an SDVOSB or VOSB concern if

(1) At least one member of the joint venture is an SDVOSB or VOSB concern, and makes the representations in paragraph (b) of this section;

(2) Each other concern is small under the size standard corresponding to the NAICS code assigned to the procurement;

(3) The joint venture meets the requirements of paragraph 7 of the size standard explanation of affiliates in FAR 19.101; and

(4) The joint venture meets the requirements of 13 CFR 125.15(b), modified to include veteran-owned small businesses where this CFR section refers to SDVOSB concerns.

(d) Any SDVOSB or VOSB concern (nonmanufacturer) must meet the requirements in FAR 19.102(f) to receive a benefit under this program.

819.7004 Contracting Order of Priority.

In determining the acquisition strategy applicable to an acquisition, the contracting officer shall consider, in the following order of priority, contracting preferences that ensure contracts will be awarded:

(a) To SDVOSBs;

(b) To VOSB, including but not limited to SDVOSBs;

(c) Pursuant to—

(1) Section 8(a) of the Small Business Act (15 U.S.C. 637(a)); or

(2) The Historically-Underutilized Business Zone (HUBZone) Program (15 U.S.C. 657a); and

(d) Pursuant to any other small business contracting preference.

819.7005 Service-disabled veteran-owned small business set-aside procedures.

(a) The contracting officer shall consider SDVOSB set-asides before considering VOSB set-asides. Except as authorized by 813.106, 819.7007 and 819.7008, the contracting officer shall set-aside an acquisition for competition restricted to SDVOSB concerns upon a reasonable expectation that,

(1) Offers will be received from two or more eligible SDVOSB concerns; and

(2) Award will be made at a fair and reasonable price.

(b) When conducting SDVOSB set-asides, the contracting officer shall ensure:

(1) Eligibility is extended to businesses owned and operated by surviving spouses; and

(2) Businesses are registered and verified as eligible in the VIP database prior to making an award.

(c) If the contracting officer receives only one acceptable offer at a fair and reasonable price from an eligible SDVOSB concern in response to a SDVOSB set-aside, the contracting officer should make an award to that concern. If the contracting officer receives no acceptable offers from eligible SDVOSB concerns, the set-aside shall be withdrawn and the requirement, if still valid, set aside for VOSB competition, if appropriate.

819.7006 Veteran-owned small business set-aside procedures.

(a) The contracting officer shall consider SDVOSB set-asides before considering VOSB set-asides. Except as authorized by 813.106, 819.7007 and 819.7008, the contracting officer shall set aside an acquisition for competition restricted to VOSB concerns upon a reasonable expectation that:

(1) Offers will be received from two or more eligible VOSB concerns; and

(2) Award will be made at a fair and reasonable price.

(b) If the contracting officer receives only one acceptable offer at a fair and reasonable price from an eligible VOSB concern in response to a VOSB set-aside, the contracting officer should make an award to that concern. If the contracting officer receives no acceptable offers from eligible VOSB concerns, the set-aside shall be withdrawn and the requirement, if still valid, set aside for other small business programs, as appropriate.

(c) When conducting VOSB set-asides, the contracting officer shall ensure the business is registered and verified as eligible in the VIP database prior to making an award.

819.7007 Sole source awards to service-disabled veteran-owned small business concerns.

(a) A contracting officer may award contracts to SDVOSB concerns on a sole source basis provided:

(1) The anticipated award price of the contract (including options) will not exceed $5 million;

(2) The requirement is synopsized in accordance with FAR part 5;

(3) The SDVOSB concern has been determined to be a responsible contractor with respect to performance; and

(4) Award can be made at a fair and reasonable price.

(b) The contracting officer's determination whether to make a sole source award is a business decision wholly within the discretion of the contracting officer. A determination that only one SDVOSB concern is available to meet the requirement is not required.

(c) When conducting a SDVOSB sole source acquisition, the contracting officer shall ensure businesses are registered and verified as eligible in the VIP database prior to making an award.

819.7008 Sole source awards to veteran-owned small business concerns.

(a) A contracting officer may award contracts to VOSB concerns on a sole source basis provided:

(1) The anticipated award price of the contract (including options) will not exceed $5 million;

(2) The requirement is synopsized in accordance with FAR part 5;

(3) The VOSB concern has been determined to be a responsible contractor with respect to performance;

(4) Award can be made at a fair and reasonable price; and

(5) No responsible SDVOSB concern has been identified.

(b) The contracting officer's determination whether to make a sole source award is a business decision wholly within the discretion of the contracting officer. A determination that only one VOSB concern is available to meet the requirement is not required.

(c) When conducting a VOSB sole source acquisition, the contracting officer shall ensure businesses are registered and verified as eligible in the VIP database prior to making an award.

819.7009 Contract clauses.

The contracting officer shall insert VAAR clause 852.219–10, Notice of Total Service-Disabled Veteran-Owned Small Business Set-Aside or 852.219–11, Notice of Total Veteran-Owned Small Business Set-Aside in solicitations and contracts for acquisitions under this subpart.

■ 29. Add subpart 819.71 to read as follows:

Subpart 819.71—VA Mentor-Protégé Program

Sec.

Authority: 38 U.S.C. 501.

Subpart 819.71—VA Mentor-Protégé Program

819.7101 Purpose.

The VA Mentor-Protégé Program is designed to assist service-disabled

veteran-owned small businesses (SDVOSBs) and veteran-owned small businesses (VOSBs) in enhancing their capabilities to perform contracts and subcontracts for VA. The Mentor-Protégé Program is also designed to improve the performance of VA contractors and subcontractors by providing developmental assistance to protégé entities, fostering the establishment of long-term business relationships between SDVOSBs, VOSBs and prime contractors, and increasing the overall number of SDVOSBs and VOSBs that receive VA contract and subcontract awards. A firm's status as a protégé under a VA contract shall not have an effect on the firm's eligibility to seek other prime contracts or subcontracts.

819.7102 Definitions.

(a) A *Mentor* is a contractor that elects to promote and develop SDVOSBs and/or VOSBs by providing developmental assistance designed to enhance the business success of the protégé. A mentor may be a large or small business concern.

(b) *OSDBU* is the Office of Small and Disadvantaged Business Utilization. This is the VA office responsible for administering, implementing and coordinating the Department's small business programs, including the Mentor-Protégé Program.

(c) *Program* refers to the VA Mentor-Protégé Program as described in this Subpart.

(d) *Protégé* means a SDVOSB or VOSB, as defined in 802.101, which meets federal small business size standards in its primary NAICS code and which is the recipient of developmental assistance pursuant to a Mentor-Protégé agreement.

819.7103 Non-affiliation.

A Protégé firm will not be considered an affiliate of a mentor firm solely on the basis that the protégé firm is receiving developmental assistance from the mentor firm under VA's Mentor-Protégé Program. The determination of affiliation is a function of the SBA.

819.7104 General policy.

(a) To be eligible, mentors and protégés must not be listed on the Excluded Parties List System, located at *http://www.epls.gov.* Mentors will provide appropriate developmental assistance to enhance the capabilities of protégés to perform as prime contractors and/or subcontractors.

(b) VA reserves the right to limit the number of participants in the program in order to ensure its effective management of the Mentor-Protégé Program.

819.7105 Incentives for prime contractor participation.

(a) Under the Small Business Act, 15 U.S.C. 637(d)(4)(e), VA is authorized to provide appropriate incentives to encourage subcontracting opportunities for small business consistent with the efficient and economical performance of the contract. This authority is limited to negotiated procurements. FAR 19.202–1 provides additional guidance.

(b) Costs incurred by a mentor to provide developmental assistance, as described in 819.7110 to fulfill the terms of their agreement(s) with a protégé firm(s), are not reimbursable as a direct cost under a VA contract. If VA is the mentor's responsible audit agency under FAR 42.703–1, VA will consider these costs in determining indirect cost rates. If VA is not the responsible audit agency, mentors are encouraged to enter into an advance agreement with their responsible audit agency on the treatment of such costs when determining indirect cost rates.

(c) In addition to subparagraph (b) of this section, contracting officers shall give mentors evaluation credit under 852.219–52, Evaluation Factor for Participation in the VA Mentor-Protégé Program, considerations for subcontracts awarded pursuant to their Mentor-Protégé Agreements and their subcontracting plans. Therefore:

(1) Contracting officers may evaluate subcontracting plans containing mentor-protégé arrangements more favorably than subcontracting plans without Mentor-Protégé Agreements.

(2) Contracting officers may assess the prime contractor's compliance with the subcontracting plans submitted in previous contracts as a factor in evaluating past performance under FAR 15.305(a)(2)(v) and determining contractor responsibility 19.705–5(a)(1).

(d) OSDBU Mentoring Award. A non-monetary award will be presented annually to the mentoring firm providing the most effective developmental support to a protégé. The Mentor-Protégé Program Manager will recommend an award winner to the OSDBU Director.

(e) OSDBU Mentor-Protégé Annual Conference. At the conclusion of each year in the Mentor-Protégé Program, mentor firms will be invited to brief contracting officers, program leaders, office directors and other guests on program progress.

819.7106 Eligibility of Mentor and Protégé firms.

Eligible business entities approved as mentors may enter into agreements (hereafter referred to as ''Mentor-Protégé Agreement'' or ''Agreement'' and explained in 819.7108) with eligible protégés. Mentors provide appropriate developmental assistance to enhance the capabilities of protégés to perform as contractors and/or subcontractors. Eligible small business entities capable of providing developmental assistance may be approved as mentors. Protégés may participate in the program in pursuit of a prime contract or as subcontractors under the mentor's prime contract with VA, but are not required to be a subcontractor to a VA prime contractor or be a VA prime contractor.

(a) Eligibility. A Mentor:

(1) May be either a large or small business entity and either a prime contractor or subcontractor;

(2) Must be able to provide developmental assistance that will enhance the ability of Protégés to perform as prime contractors or subcontractors; and

(3) Will be encouraged to enter into arrangements with entities with which it has established business relationships.

(b) Eligibility. A Protégé:

(1) Must be a SDVOSB or VOSB as defined in 802.101;

(2) Must meet the size standard corresponding to the NAICS code that the Mentor prime contractor believes best describes the product or service being acquired by the subcontract; and

(c) Protégés may have multiple mentors. Protégés participating in mentor-protégé programs in addition to VA's Program should maintain a system for preparing separate reports of mentoring activity so that results of VA's Program can be reported separately from any other agency program.

(d) A protégé firm shall self-represent to a mentor firm that it meets the requirements set forth in paragraph (b) of this section. Mentors shall confirm eligibility by documenting the verified status of the protégé in the VetBiz.gov VIP database. Protégés must maintain verified status throughout the term of the Mentor-Protégé Agreement. Failure to do so shall result in cancellation of the Agreement.

819.7107 Selection of Protégé firms.

(a) Mentor firms will be solely responsible for selecting protégé firms. Mentors are encouraged to select from a broad base of SDVOSB or VOSB firms whose core competencies support VA's mission; and choose SDVOSB and/or VOSB protégés in addition to firms with whom they have established business relationships.

(b) Mentors may have multiple protégés. However, to preserve the integrity of the Program and assure the quality of developmental assistance provided to protégés, VA reserves the right to limit the total number of protégés participating under each mentor firm for the Mentor-Protégé Program.

(c) The selection of protégé firms by mentor firms may not be protested, except that any protest regarding the size or eligibility status of an entity selected by a mentor shall be handled in accordance with the FAR and SBA regulations.

819.7108 Application process.

(a) Firms interested in becoming approved mentor-protégé participants must submit a joint written VA Mentor-Protégé Agreement to the VA OSDBU for review and approval. The proposed Mentor-Protégé Agreement will be evaluated on the extent to which the mentor plans to provide developmental assistance. Evaluations will consider the nature and extent of technical and managerial support as well as any proposed financial assistance in the form of equity investment, loans, joint-venture, and traditional subcontracting support.

(b) The Mentor-Protégé Agreement must contain:

(1) Names, addresses, phone numbers, and e-mail addresses (if available) of the mentor and protégé firm(s) and a point of contact for both mentor and protégé who will oversee the agreement;

(2) A statement from the protégé firm that the firm is currently eligible as a SDVOSB or VOSB to participate in VA's Mentor-Protégé Program;

(3) A description of the mentor's ability to provide developmental assistance to the protégé and the type of developmental assistance that will be provided, to include a description of the types and dollar amounts of subcontract work, if any, that may be awarded to the protégé firm;

(4) Duration of the Agreement, including rights and responsibilities of both parties (mentor and protégé), with bi-annual reviews;

(5) Termination procedures, including procedures for the parties' voluntary withdrawal from the Program. The Agreement shall require the mentor or the protégé to notify the other firm and VA OSDBU in writing at least 30 days in advance of its intent to voluntarily terminate the Agreement;

(6) A schedule with milestones for providing assistance;

(7) Criteria for evaluation of the protégé's developmental success;

(8) A plan addressing how the mentor will increase the quality of the protégé firm's technical capabilities and contracting and subcontracting opportunities;

(9) An estimate of the total cost of the planned mentoring assistance to be provided to the Protégé;

(10) An agreement by both parties to comply with the reporting requirements of 819.7113;

(11) A plan for accomplishing unfinished work should the Agreement be voluntarily cancelled;

(12) Other terms and conditions, as appropriate; and

(13) Signatures and date(s).

(c) The Agreement defines the relationship between the mentor and the protégé firms only. The Agreement does not create any privity of contract between the mentor and VA or the protégé and VA.

819.7109 VA review of application.

(a) VA OSDBU will review the information to establish the mentor and protégé eligibility and to ensure that the information that is in VAAR 819.7108 is included. If the application relates to a specific contract, then OSDBU will consult with the responsible contracting officer on the adequacy of the proposed Agreement, as appropriate. OSDBU will complete its review no later than 30 calendar days after receipt of the application or after consultation with the contracting officer, whichever is later. There is no charge to apply for the Mentor-Protégé Program.

(b) After OSDBU completes its review and provides written approval, the mentor may execute the Agreement and implement the developmental assistance as provided under the Agreement. OSDBU will post a copy of the Mentor-Protégé Agreements to a VA Web site to be accessible to VA contracting officers for review for any VA contracts affected by the Agreement.

(c) If the application is disapproved, the mentor may provide additional information for reconsideration. OSDBU will complete review of any supplemental material no later than 30 days after its receipt. Upon finding deficiencies that VA considers correctable, OSDBU will notify the mentor and protégé and request correction of deficiencies to be provided within 15 days.

819.7110 Developmental assistance.

The forms of developmental assistance a mentor can provide to a protégé include, but are not limited to, the following:

(a) Guidance relating to—

(1) Financial management;

(2) Organizational management;

(3) Overall business management/ planning;

(4) Business development; and

(5) Technical assistance.

(b) Loans.

(c) Rent-free use of facilities and/or equipment.

(d) Property.

(e) Temporary assignment of personnel to a Protégé for training.

(f) Any other types of permissible, mutually beneficial assistance.

819.7111 Obligations under the Mentor-Protégé Program.

(a) A mentor or protégé may voluntarily withdraw from the Program. However, in no event shall such withdrawal impact the contractual requirements under any prime contract with VA.

(b) Mentors and protégés shall submit reports to VA OSDBU in accordance with 819.7113.

819.7112 Internal controls.

(a) OSDBU will oversee the Program and will work cooperatively with relevant contracting officers to achieve Program objectives. OSDBU will establish internal controls as checks and balances applicable to the Program. These controls will include:

(1) Reviewing and evaluating mentor applications for validity of the provided information;

(2) Reviewing bi-annual progress reports submitted by mentors and protégés on protégé development to measure protégé progress against the plan submitted in the approved Agreement;

(3) Reviewing and evaluating financial reports and invoices submitted by the mentor to verify that VA is not charged by the mentor for providing developmental assistance to the protégé; and

(4) Limiting the number of participants in the Mentor-Protégé Program within a reporting period, in order to insure the effective management of the Program.

(b) VA may rescind approval of an existing Mentor-Protégé Agreement if it determines that such action is in VA's best interest. The rescission shall be in writing and sent to the mentor and protégé after approval by the OSDBU Director. Rescission of an Agreement does not change the terms of any subcontract between the mentor and the protégé.

819.7113 Reports.

(a) Mentor and protégé entities shall submit to VA's OSDBU bi-annual reports on progress under the Mentor-

Protégé Agreement. VA will evaluate reports by considering the following:

(1) Specific actions taken by the mentor during the evaluation period to increase the participation of their protégé(s) as suppliers to VA, other government agencies and to commercial entities;

(2) Specific actions taken by the mentor during the evaluation period to develop technical and administrative expertise of a protégé as defined in the Agreement;

(3) The extent to which the protégé has met the developmental objectives in the Agreement;

(4) The extent to which the mentor's participation in the Mentor-Protégé Program impacted the protégé'(s) ability to receive contract(s) and subcontract(s) from private firms and federal agencies other than VA; and, if deemed necessary;

(5) Input from the protégé on the nature of the developmental assistance provided by the mentor.

(b) OSDBU will submit annual reports to the relevant contracting officer regarding participating prime contractor(s)' performance in the Program.

(c) In addition to the written progress report in paragraph (a) of this section, at the mid-term point in the Mentor-Protégé Agreement, the mentor and the protégé shall formally brief the VA OSDBU regarding program accomplishments as pertains to the approved agreement.

(d) Mentor and protégé firms shall submit an evaluation to OSDBU at the conclusion of the mutually agreed upon Program period, the conclusion of the contract, or the voluntary withdrawal by either party from the Program, whichever comes first.

819.7114 Measurement of program success.

The overall success of the VA Mentor-Protégé Program encompassing all participating mentors and protégés will be measured by the extent to which it results in:

(a) An increase in the quality of the technical capabilities of the protégé firm.

(b) An increase in the number and dollar value of contract and subcontract awards to protégé firms since the time of their entry into the program attributable to the mentor-protégé relationship (under VA contracts, contracts awarded by other Federal agencies and under commercial contracts.)

819.7115 Solicitation provisions.

(a) Insert 852.219–71, VA Mentor-Protégé Program, in solicitations that include FAR clause 52.219–9, Small Business Subcontracting Plan.

(b) Insert 852.219–72, Evaluation Factor for Participation in the VA Mentor-Protégé Program, in solicitations that include an evaluation factor for participation in VA's Mentor-Protégé Program in accordance with 819.7105 and that also include FAR clause 52.219–9, Small Business Subcontracting Plan.

PART 828—BONDS AND INSURANCE

■ 30. The authority citation for part 828 is revised to read as follows:

Authority: 38 U.S.C. 501, 8127, 8128 and 8151–8153; 40 U.S.C. 121(c); and 48 CFR 1.301–1.304.

■ 31. Add section 828.106–71 to read as follows:

828.106–71 Assisting service-disabled veteran-owned and veteran-owned small businesses in obtaining bonding.

VA prime contractors are encouraged to assist SDVOSB concerns and VOSB concerns in obtaining subcontractor performance and payment bonds. Mentors are especially encouraged to assist their protégés in obtaining bid, payment, and performance bonds as prime contractors and bonds as subcontractors when bonds are required.

■ 32. Add section 828.106–72 to read as follows:

828.106–72 Contract provision.

Insert 852.228–72, Assisting Service-Disabled Veteran-Owned and Veteran-Owned Small Businesses in Obtaining Bonds, in solicitations that include FAR clause 52.228–1, Bid Guarantee.

PART 852—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 33. The authority citation for part 852 is revised to read as follows:

Authority: 38 U.S.C. 501, 8127, 8128, and 8151–8153; 40 U.S.C. 121(c); and 48 CFR 1.301–1.304.

■ 34. Add section 852.215–70 to read as follows:

852.215–70 Service-Disabled Veteran-Owned and Veteran-Owned Small Business Evaluation Factors.

As prescribed in 815.304–71(a), insert the following clause:

Service-Disabled Veteran-Owned and Veteran-Owned Small Business Evaluation Factors

(DEC2009)

(a) In an effort to achieve socioeconomic small business goals, depending on the evaluation factors included in the solicitation, VA shall evaluate offerors based on their service-disabled veteran-owned or veteran-owned small business status and their proposed use of eligible service-disabled veteran-owned small businesses and veteran-owned small businesses as subcontractors.

(b) Eligible service-disabled veteran-owned offerors will receive full credit, and offerors qualifying as veteran-owned small businesses will receive partial credit for the Service-Disabled Veteran-Owned and Veteran-owned Small Business Status evaluation factor. To receive credit, an offeror must be registered and verified in Vendor Information Pages (VIP) database. (*http://www.VetBiz.gov*).

(c) Non-veteran offerors proposing to use service-disabled veteran-owned small businesses or veteran-owned small businesses as subcontractors will receive some consideration under this evaluation factor. Offerors must state in their proposals the names of the SDVOSBs and VOSBs with whom they intend to subcontract and provide a brief description of the proposed subcontracts and the approximate dollar values of the proposed subcontracts. In addition, the proposed subcontractors must be registered and verified in the VetBiz.gov VIP database (*http://www.vetbiz.gov*).

(End of Clause)

■ 35. Add section 852.215–71 to read as follows:

852.215–71 Evaluation Factor Commitments.

As prescribed in 815.304–71(b), insert the following clause:

Evaluation Factor Commitments

(Dec2009)

The offeror agrees, if awarded a contract, to use the service-disabled veteran-owned small businesses or veteran-owned small businesses proposed as subcontractors in accordance with 852.215–70, Service-Disabled Veteran-Owned and Veteran-Owned Small Business Evaluation Factors, or to substitute one or more service-disabled veteran-owned small businesses or veteran-owned small businesses for subcontract work of the same or similar value.

(End of Clause)

■ 36. Add section 852.219–9 to read as follows:

852.219–9 VA Small Business Subcontracting Plan Minimum Requirements.

As prescribed in subpart 819.709, insert the following clause:

VA Small Business Subcontracting Plan Minimum Requirements

(DEC2009)

(a) This clause does not apply to small business concerns.

(b) If the offeror is required to submit an individual subcontracting plan, the minimum goals for award of subcontracts to service-disabled veteran-owned small business concerns and veteran-owned small business concerns shall be at least

commensurate with the Department's annual service-disabled veteran-owned small business and veteran-owned small business prime contracting goals for the total dollars planned to be subcontracted.

(c) For a commercial plan, the minimum goals for award of subcontracts to service-disabled veteran-owned small business concerns and veteran-owned small businesses shall be at least commensurate with the Department's annual service-disabled veteran-owned small business and veteran-owned small business prime contracting goals for the total value of projected subcontracts to support the sales for the commercial plan.

(d) To be credited toward goal achievements, businesses must be verified as eligible in the Vendor Information Pages database. The contractor shall annually submit a listing of service-disabled veteran-owned small businesses and veteran-owned small businesses for which credit toward goal achievement is to be applied for the review of personnel in the Office of Small and Disadvantaged Business Utilization.

(e) The contractor may appeal any businesses determined not eligible for crediting toward goal achievements by following the procedures contained in 819.407.

(End of Clause)

■ 37. Add section 852.219–10 to read as follows:

852.219–10 VA Notice of Total Service-Disabled Veteran-Owned Small Business Set-Aside.

As prescribed in 819.7009, insert the following clause:

VA Notice of Total Service-Disabled Veteran-Owned Small Business Set-Aside

(DEC2009)

(a) *Definition.* For the Department of Veterans Affairs, ''Service-disabled veteran-owned small business concern'':

(1) Means a small business concern:

(i) Not less than 51 percent of which is owned by one or more service-disabled veterans or, in the case of any publicly owned business, not less than 51 percent of the stock of which is owned by one or more service-disabled veterans (or eligible surviving spouses);

(ii) The management and daily business operations of which are controlled by one or more service-disabled veterans (or eligible surviving spouses) or, in the case of a service-disabled veteran with permanent and severe disability, the spouse or permanent caregiver of such veteran;

(iii) The business meets Federal small business size standards for the applicable North American Industry Classification System (NAICS) code identified in the solicitation document; and

(iv) The business has been verified for ownership and control and is so listed in the Vendor Information Pages database, (*http://www.VetBiz.gov*).

(2) ''Service-disabled veteran'' means a veteran, as defined in 38 U.S.C. 101(2), with a disability that is service-connected, as defined in 38 U.S.C. 101(16).

(b) *General.* (1) Offers are solicited only from service-disabled veteran-owned small business concerns. Offers received from concerns that are not service-disabled veteran-owned small business concerns shall not be considered.

(2) Any award resulting from this solicitation shall be made to a service-disabled veteran-owned small business concern.

(c) *Agreement.* A service-disabled veteran-owned small business concern agrees that in the performance of the contract, in the case of a contract for:

(1) Services (except construction), at least 50 percent of the cost of personnel for contract performance will be spent for employees of the concern or employees of other eligible service-disabled veteran-owned small business concerns;

(2) Supplies (other than acquisition from a nonmanufacturer of the supplies), at least 50 percent of the cost of manufacturing, excluding the cost of materials, will be performed by the concern or other eligible service-disabled veteran-owned small business concerns;

(3) General construction, at least 15 percent of the cost of the contract performance incurred for personnel will be spent on the concern's employees or the employees of other eligible service-disabled veteran-owned small business concerns; or

(4) Construction by special trade contractors, at least 25 percent of the cost of the contract performance incurred for personnel will be spent on the concern's employees or the employees of other eligible service-disabled veteran-owned small business concerns.

(d) A joint venture may be considered a service-disabled veteran owned small business concern if—

(1) At least one member of the joint venture is a service-disabled veteran-owned small business concern, and makes the following representations: That it is a service-disabled veteran-owned small business concern, and that it is a small business concern under the North American Industry Classification Systems (NAICS) code assigned to the procurement;

(2) Each other concern is small under the size standard corresponding to the NAICS code assigned to the procurement; and

(3) The joint venture meets the requirements of paragraph 7 of the explanation of Affiliates in 19.101 of the Federal Acquisition Regulation.

(4) The joint venture meets the requirements of 13 CFR 125.15(b).

(e) Any service-disabled veteran-owned small business concern (non-manufacturer) must meet the requirements in 19.102(f) of the Federal Acquisition Regulation to receive a benefit under this program.

(End of Clause)

■ 38. Add section 852.219–11 to read as follows:

852.219–11 VA Notice of Total Veteran-Owned Small Business Set-Aside.

As prescribed in 819.7009, insert the following clause:

VA Notice of Total Veteran-Owned Small Business Set-Aside

(DEC2009)

(a) *Definition.* For the Department of Veterans Affairs, ''Veteran-owned small business concern''—

(1) Means a small business concern—

(i) Not less than 51 percent of which is owned by one or more veterans or, in the case of any publicly owned business, not less than 51 percent of the stock of which is owned by one or more veterans;

(ii) The management and daily business operations of which are controlled by one or more veterans;

(iii) The business meets Federal small business size standards for the applicable North American Industry Classification System (NAICS) code identified in the solicitation document; and

(iv) The business has been verified for ownership and control and is so listed in the Vendor Information Pages database, (*http://www.VetBiz.gov*).

(2) ''Veteran'' is defined in 38 U.S.C. 101(2).

(b) *General.* (1) Offers are solicited only from veteran-owned small business concerns. All service-disabled veteran-owned small businesses are also determined to be veteran-owned small businesses if they meet the criteria identified in paragraph (a)(1) of this section. Offers received from concerns that are not veteran-owned small business concerns shall not be considered.

(2) Any award resulting from this solicitation shall be made to a veteran-owned small business concern.

(c) *Agreement.* A veteran-owned small business concern agrees that in the performance of the contract, in the case of a contract for—

(1) Services (except construction), at least 50 percent of the cost of personnel for contract performance will be spent for employees of the concern or employees of other eligible veteran-owned small business concerns;

(2) Supplies (other than acquisition from a non-manufacturer of the supplies), at least 50 percent of the cost of manufacturing, excluding the cost of materials, will be performed by the concern or other eligible veteran-owned small business concerns;

(3) General construction, at least 15 percent of the cost of the contract performance incurred for personnel will be spent on the concern's employees or the employees of other eligible veteran-owned small business concerns; or

(4) Construction by special trade contractors, at least 25 percent of the cost of the contract performance incurred for personnel will be spent on the concern's employees or the employees of other eligible veteran-owned small business concerns.

(d) A joint venture may be considered a veteran-owned small business concern if:

(1) At least one member of the joint venture is a veteran-owned small business concern, and makes the following representations: That it is a veteran-owned small business concern, and that it is a small business concern under the NAICS code assigned to the procurement;

(2) Each other concern is small under the size standard corresponding to the NAICS code assigned to the procurement;

(3) The joint venture meets the requirements of paragraph 7 of the explanation of Affiliates in 19.101 of the Federal Acquisition Regulation; and

(4) The joint venture meets the requirements of 13 CFR 125.15(b), except that the principal company may be a veteran-owned small business concern or a service-disabled veteran-owned small business concern.

(e) Any veteran-owned small business concern (non-manufacturer) must meet the requirements in 19.102(f) of the Federal Acquisition Regulation to receive a benefit under this program.

(End of Clause)

■ 39. Add section 852.219–71 to read as follows:

852.219–71 VA Mentor-Protégé Program.

As prescribed in 819.7115(a), insert the following clause:

VA Mentor-Protégé Program

(DEC2009)

(a) Large businesses are encouraged to participate in the VA Mentor-Protégé Program for the purpose of providing developmental assistance to eligible service-disabled veteran-owned small businesses and veteran-owned small businesses to enhance the small businesses' capabilities and increase their participation as VA prime contractors and as subcontractors.

(b) The program consists of:

(1) Mentor firms, which are contractors capable of providing developmental assistance;

(2) Protégé firms, which are service-disabled veteran-owned small business concerns or veteran-owned small business concerns; and

(3) Mentor-Protégé Agreements approved by the VA Office of Small and Disadvantaged Business Utilization.

(c) Mentor participation in the program means providing business developmental assistance to aid protégés in developing the requisite expertise to effectively compete for and successfully perform VA prime contracts and subcontracts.

(d) Large business prime contractors serving as mentors in the VA Mentor-Protégé Program are eligible for an incentive for subcontracting plan credit. VA will recognize the costs incurred by a mentor firm in providing assistance to a protégé firm and apply those costs for purposes of determining whether the mentor firm attains its subcontracting plan participation goals under a VA contract. The amount of credit given to a mentor firm for these protégé developmental assistance costs shall be calculated on a dollar-for-dollar basis and reported by the large business prime contractor via the Electronic Subcontracting Reporting System (eSRS).

(e) Contractors interested in participating in the program are encouraged to contact the VA Office of Small and Disadvantaged Business Utilization for more information.

(End of Clause)

■ 40. Add section 852.219–72 to read as follows:

852.219–72 Evaluation Factor for Participation in the VA Mentor-Protégé Program.

As prescribed in 819.7115(b), insert the following clause:

Evaluation Factor for Participation in the VA Mentor-Protégé Program

(DEC2009)

This solicitation contains an evaluation factor or sub-factor regarding participation in the VA Mentor-Protégé Program. In order to receive credit under the evaluation factor or sub-factor, the offeror must provide with its proposal a copy of a signed letter issued by the VA Office of Small and Disadvantaged Business Utilization approving the offeror's Mentor-Protégé Agreement.

(End of Clause)

■ 41. Add section 852.228–72 to read as follows:

852.228–72 Assisting Service-Disabled Veteran-Owned and Veteran-Owned Small Businesses in Obtaining Bonds.

As prescribed in 828.106–71, insert the following clause:

Assisting Service-Disabled Veteran-Owned Small Businesses and Veteran-Owned Small Businesses in Obtaining Bonds

(DEC2009)

Prime contractors are encouraged to assist service-disabled veteran-owned and veteran-owned small business potential subcontractors in obtaining bonding, when required. Mentor firms are encouraged to assist protégé firms under VA's Mentor-Protégé Program in obtaining acceptable bid, payment, and performance bonds, when required, as a prime contractor under a solicitation or contract and in obtaining any required bonds under subcontracts.

[FR Doc. E9–28461 Filed 12–7–09; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 21

[FWS–R9–MB–2009–0071; 91200–1231–9BPP]

RIN 1018–AW98

Migratory Bird Permits; States Delegated Falconry Permitting Authority

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: The States of Mississippi, Montana, Oklahoma, Pennsylvania, Texas, and Utah have requested that we, the U.S. Fish and Wildlife Service, delegate permitting for falconry to the State, as provided under the regulations at 50 CFR 21.29. We have reviewed regulations and supporting materials provided by the States, and have concluded that their regulations comply with the Federal regulations. We change the falconry regulations accordingly.

DATES: This rule is effective January 7, 2010.

FOR FURTHER INFORMATION CONTACT: Dr. George T. Allen, Division of Migratory Bird Management, U.S. Fish and Wildlife Service, 703–358–1825.

SUPPLEMENTARY INFORMATION:

Background

We, the U.S. Fish and Wildlife Service, published a final rule in the **Federal Register** on October 8, 2008, to revise our regulations governing falconry in the United States (50 CFR 21.29). The regulations provide that, when a State meets the requirements for operating under the regulations, falconry permitting must be delegated to the State. The States of Mississippi, Montana, Oklahoma, Pennsylvania, Texas, and Utah have submitted revised falconry regulations and supporting materials, and have requested to be allowed to operate under the revised Federal regulations. We have reviewed the States' regulations and determined that they meet the requirements of 50 CFR 21.29(b). According to the regulations at § 21.29(b)(4), we must issue a rule to add the State to the list at § 21.29(b)(10) of approved States with a falconry program. We change the Federal regulations accordingly. Therefore, a Federal permit will no longer be required to practice falconry in the States of Mississippi, Montana, Oklahoma, Pennsylvania, Texas, and Utah beginning January 1, 2010.

Administrative Procedure

In accordance with section 553 of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*), we are issuing this final rule without prior opportunity for public comment. Under the regulations at 50 CFR 21.29(b)(1)(ii), the Director of the U.S. Fish and Wildlife Service must determine if a State, tribal, or territorial falconry permitting program meets Federal requirements. When the Director makes this determination, the Service is required by regulations at 50 CFR 21.29(b)(4) to publish a rule in the **Federal Register** adding the State, tribe, or territory to the list of those approved for allowing the practice of falconry. On January 1st of the calendar year following publication of the rule, the

Service will terminate Federal falconry permitting in any State certified under the regulations at 50 CFR 21.29. This is a ministerial and non-discretionary action that must be enacted in short order to enable the subject States to assume all responsibilities of falconry permitting by January 1, 2010, the effective date of this regulatory amendment. Further, the relevant regulation at 50 CFR 21.29 governing the transfer of permitting authority to these States has already been subject to public notice and comment procedures. Therefore, in accordance with 5 U.S.C. 553(b)(3)(B), we did not publish a proposed rule in regard to this rulemaking action because, for good cause as stated above, we found prior public notice and comment procedures to be unnecessary.

Required Determinations

Regulatory Planning and Review

The Office of Management and Budget (OMB) has determined that this rule is not significant under Executive Order 12866. OMB bases its determination upon the following four criteria:

a. Whether the rule will have an annual effect of $100 million or more on the economy or adversely affect an economic sector, productivity, jobs, the environment, or other units of the government.

b. Whether the rule will create inconsistencies with other Federal agencies' actions.

c. Whether the rule will materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.

d. Whether the rule raises novel legal or policy issues.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 (Pub. L. 104–121), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (that is, small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency certifies the rule will not have a significant economic impact on a substantial number of small entities.

SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide the statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities. We have examined this rule's potential effects on small entities as required by the Regulatory Flexibility Act, and have determined that this action will not have a significant economic impact on a substantial number of small entities. This rule delegates authority to States that have requested it, and those States have already changed their falconry regulations. This rule does not change falconers' costs for practicing their sport, nor does it affect businesses that provide equipment or supplies for falconry.

Consequently, we certify that, because this rule will not have a significant economic effect on a substantial number of small entities, a regulatory flexibility analysis is not required.

This rule is not a major rule under the SBREFA (5 U.S.C. 804(2)). It will not have a significant economic impact on a substantial number of small entities.

a. This rule does not have an annual effect on the economy of $100 million or more. There are no costs to permittees or any other part of the economy associated with this regulations change.

b. This rule will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions. The practice of falconry does not significantly affect costs or prices in any sector of the economy.

c. This rule will not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. Falconry is an endeavor of private individuals. Neither regulation nor practice of falconry significantly affects business activities.

Unfunded Mandates Reform Act

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), we have determined the following:

a. This rule will not ''significantly or uniquely'' affect small governments in a negative way. A small government agency plan is not required. The four States affected by this rule applied for the authority to issue permits for the practice of falconry.

b. This rule will not produce a Federal mandate of $100 million or greater in any year; i.e., it is not a ''significant regulatory action'' under the Unfunded Mandates Reform Act.

Takings

In accordance with E.O. 12630, the rule does not have significant takings implications. A takings implication assessment is not required. This rule does not contain a provision for taking of private property.

Federalism

This rule does not have sufficient Federalism effects to warrant preparation of a Federalism assessment under E.O. 13132. The States being delegated authority to issue permits to conduct falconry have requested that authority. No significant economic impacts are expected to result from the regulation of falconry.

Civil Justice Reform

In accordance with E.O. 12988, the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order.

Paperwork Reduction Act

We examined this rule under the Paperwork Reduction Act of 1995. OMB has approved the information collection requirements of the Migratory Bird Permits Program and assigned OMB control number 1018–0022, which expires November 30, 2010. This regulation change does not add to the approved information collection. Information from the collection is used to document take of raptors from the wild for use in falconry and to document transfers of raptors held for falconry between permittees. A Federal agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act

We evaluated the environmental impacts of the changes to these regulations, and determined that this rule does not have any environmental impacts. Within the spirit and intent of the Council on Environmental Quality's regulations for implementing the National Environmental Policy Act (NEPA), and other statutes, orders, and policies that protect fish and wildlife resources, we determined that these regulatory changes do not have a significant effect on the human environment.

Under the guidance in Appendix 1 of the Department of the Interior Manual at 516 DM 2, we conclude that the regulatory changes are categorically excluded because they ''have no or minor potential environmental impact''

(516 DM 2, Appendix 1A(1)). No more comprehensive NEPA analysis of the regulations change is required.

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951), Executive Order 13175, and 512 DM 2, we have evaluated potential effects on Federally recognized Indian Tribes and have determined that this rule will not interfere with Tribes' ability to manage themselves or their funds or to regulate falconry on Tribal lands.

Energy Supply, Distribution, or Use

E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. Because this rule only affects the practice of falconry in the United States, it is not a significant regulatory action under E.O. 12866, and will not significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action and no Statement of Energy Effects is required.

Environmental Consequences of the Proposed Action

Socioeconomic. We do not expect the proposed action to have discernible socioeconomic impacts.

Raptor populations. This rule will not change the effects of falconry on raptor populations. We have reviewed and approved the State regulations.

Endangered and Threatened Species. This rule does not change protections for endangered and threatened species.

Compliance With Endangered Species Act Requirements

Section 7 of the Endangered Species Act (ESA) of 1973, as amended (16 U.S.C. 1531 *et seq.*), requires that ''The Secretary [of the Interior] shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter'' (16 U.S.C. 1536(a)(1)). It further states that the Secretary must ''insure that any action authorized, funded, or carried out * * * is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat'' (16 U.S.C. 1536(a)(2)). Delegating falconry permitting authority to States with approved programs will not affect threatened or endangered species or their habitats in the United States.

List of Subjects in 50 CFR Part 21

Exports, Hunting, Imports, Reporting and recordkeeping requirements, Transportation, Wildlife.

■ For the reasons stated in the preamble, we amend part 21 of subpart C, subchapter B, chapter I, title 50 of the Code of Federal Regulations, as follows:

PART 21—MIGRATORY BIRD PERMITS

■ 1. The authority citation for part 21 continues to read as follows:

Authority: .0 Migratory Bird Treaty Act, 40 Stat. 755 (16 U.S.C. 703); Public Law 95–616, 92 Stat. 3112 (16 U.S.C. 712(2)); Public Law 106–108, 113 Stat. 1491, Note Following 16 U.S.C. 703.

§ 21.29 [Amended]

■ 2. Amend § 21.29 as follows:

■ a. In paragraph (b)(10)(i), remove the brackets and the words ''[—States, tribes, and territories in compliance with these revised regulations—]'' and add in their place the words ''Mississippi, Montana, Oklahoma, Pennsylvania, Texas, or Utah,'' and

■ b. In paragraph (b)(10)(ii), remove the words ''Mississippi,'' ''Montana,'' ''Oklahoma,'' ''Pennsylvania,'' ''Texas,'' and ''Utah''.

Dated: November 20, 2009.

Thomas L. Strickland,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. E9–29060 Filed 12–7–09; 8:45 am]

BILLING CODE 4310–55–P

Proposed Rules

Federal Register
Vol. 74, No. 234
Tuesday, December 8, 2009

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2009–0890]

RIN 1625–AA09

Drawbridge Operation Regulation; Chambers Creek, Steilacoom, WA, Schedule Change

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to modify the drawbridge operation regulation for the Burlington Northern Santa Fe Railroad Bridge across Chambers Creek, mile 0.0, at Steilacoom, Washington, so that two-hour notice would be required for openings from 3:30 p.m. to 7 a.m. every day. Openings at all other times would be on signal. The proposed rule is necessary to reduce the bridge staffing requirements during periods of infrequent openings.

DATES: Comments and related material must reach the Coast Guard on or before February 8, 2010.

ADDRESSES: You may submit comments identified by the Coast Guard docket number USCG–2009–0890 using any one of the following methods:

(1) *Federal eRulemaking Portal: http://www.regulations.gov*.

(2) *Fax:* 202–493–2251.

(3) *Mail:* Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC, 20590–0001.

(4) *Hand delivery:* Same as mail address above, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

To avoid duplication, please use only one of these methods. *See* the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section below for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions on this proposed rule, call or e-mail Austin Pratt, Chief, Bridge Section, Waterways Management Branch, 13th Coast Guard District, telephone 206–220–7282, e-mail address *william.a.pratt@uscg.mil.* If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related materials. All comments received will be posted, without change, to *http://www.regulations.gov* and will include any personal information you have provided.

Submitting Comments

If you submit a comment, please include the docket number for this rulemaking (USCG–2009–0890), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online (*http://www.regulations.gov*), or by fax, mail or hand delivery, but please use only one of these means. If you submit a comment online via *http://www.regulations.gov*, it will be considered received by the Coast Guard when you successfully transmit the comment. If you fax, hand deliver, or mail your comment, it will be considered received by the Coast Guard when it is received at the Docket Management Facility. We recommend that you include your name and a mailing address, an e-mail address, or a phone number in the body of your document so that we can contact you if we have questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov*, click on the ''submit a comment'' box, which will then become highlighted in blue. In the ''Document Type'' drop down menu select ''Proposed Rules'' and insert ''USCG–2009–0890'' in the ''Keyword'' box. Click ''Search'' then click on the balloon shape in the ''Actions'' column. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit them by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period and may change the rule based on your comments.

Viewing Comments and Documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov*, click on the ''read comments'' box, which will then become highlighted in blue. In the ''Keyword'' box insert ''USCG–2009–0890'' and click ''Search''. Click the ''Open Docket Folder'' in the ''Actions'' column. You may also visit either the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue, SE, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. We have an agreement with the Department of Transportation to use the Docket Management Facility.

Privacy Act

Anyone can search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review a Privacy Act notice regarding our public dockets in the January 17, 2008, issue of the **Federal Register** (73 FR 3316).

Public Meeting

We do not now plan to hold a public meeting, but you may submit a request using one of the four methods under **ADDRESSES.** Please explain why one would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register.**

Background and Purpose

The proposed rule will change current regulations so that Burlington Northern

Railroad, the owner of the Chambers Creek Bridge, will only be required to raise the draw of the bridge between 3:30 p.m. and 7 a.m. everyday if at least two hours of notice is provided. At all other times the draw will be required to be raised on signal.

From February 16, 2009 through June 30, 2009 the draw opened 127 times for vessels. These records indicate that the lift span has opened on average once a day during that period. Due to the infrequent need to open the draw, the railroad company requested this change to reduce unnecessary staffing of the bridge.

The operating regulations currently in effect for the Chambers Creek Bridge are found at 33 CFR Part 117, Subpart A, the general operating regulations for drawbridges. It must open promptly on signal at any time, which requires constant attendance by drawtenders.

The waterway traffic at this drawbridge is confined to recreational vessels that moor just inside the mouth and upstream of the bridge in Chambers Creek. The creek is a tributary of Puget Sound.

Discussion of Proposed Rule

The Coast Guard proposes to amend 33 CFR Part 117 by adding § 117.1030 Chambers Creek to Subpart B of 33 CFR Part 117. The language of the new section would require the draw of the bridge to be raised between 3:30 p.m. and 7 a.m. everyday only if at least two hours of notice is provided. At all other times the draw will be required to be raised on signal.

Regulatory Analyses

We developed this proposed rule after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analyses based on 13 of these statutes or executive orders.

Regulatory Planning and Review

This proposed rule is not a ''significant regulatory action'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. The Coast Guard has made this determination based on the fact that the proposed rule will have little, if any, impact on the ability of vessels to pass under the Burlington Northern Santa Fe Railroad Bridge across Chambers Creek since the draw rarely has to open for vessel traffic and vessel operators will still be able to have the draw opened either on signal or by giving 2 hours notice depending on the time of day.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this proposed rule would have a significant economic impact on a substantial number of small entities. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities because the proposed rule will have little, if any, impact on the ability of vessels to pass under the Burlington Northern Santa Fe Railroad Bridge across Chambers Creek since the draw rarely has to open for vessel traffic and vessel operators will still be able to have the draw opened either on signal or by giving 2 hours notice depending on the time of day.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (*see* **ADDRESSES**) explaining why you think it qualifies and how, and to what degree this rule would economically affect it.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule so that they can better evaluate its effects on them and participate in the rulemaking. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact Austin Pratt, Chief, Bridge Section, Waterways Management Branch, 13th Coast Guard District, at (206) 220–7282. The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

Collection of Information

This proposed rule would call for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520.).

Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this proposed rule under that Order and have determined that it does not have implications for federalism.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 or more in any one year. Though this proposed rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

Taking of Private Property

This proposed rule would not effect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

This proposed rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Protection of Children

We have analyzed this proposed rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and would not create an environmental risk to health or risk to safety that might disproportionately affect children.

Indian Tribal Governments

This proposed rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it would not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Energy Effects

We have analyzed this proposed rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a ''significant energy action'' under that order because it is not a ''significant regulatory action'' under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of Information and Regulatory Affairs has not designated this as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This proposed rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

Environment

We have analyzed this proposed rule under Department of Homeland Security Management Directive 023–01, and Commandant Instruction M16475.lD which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is one of a category of actions which do not individually or cumulatively have a significant effect on the human environment because it simply promulgates the operating regulations or procedures for drawbridges. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

List of Subjects in 33 CFR Part 117

Bridges.

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 117 as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

1. The authority citation for part 117 continues to read as follows:

Authority: 33 U.S.C. 499; 33 CFR 1.05–1; Department of Homeland Security Delegation No. 0170.1.

2. Add § 117.1030 to read as follows:

§ 117.1030 Chambers Creek.

The draw of the Burlington Northern Santa Fe Railroad Bridge across Chambers Creek, mile 0.0, at Steilacoom shall open on signal if at least two-hour notice is given between 3:30 p.m. and 7 a.m. daily. At all other times the bridge shall open on signal.

Dated: October 15, 2009.

G.T. Blore,

Rear Admiral, U.S. Coast Guard Commander, Thirteenth Coast Guard District.

[FR Doc. E9–29128 Filed 12–7–09; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 261

[EPA–HQ–RCRA–2005–0017; FRL–9089–5]

RIN 2050–AG57

Withdrawal of the Emission-Comparable Fuel Exclusion Under RCRA

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to withdraw the conditional exclusion from regulations promulgated on December 19, 2008 under subtitle C of the Resource Conservation and Recovery Act (RCRA) for so-called Emission Comparable Fuel (ECF). These are fuels produced from hazardous secondary materials which, when burned in industrial boilers under specified conditions, generate emissions that are comparable to emissions from burning fuel oil in those boilers. EPA is proposing to withdraw this conditional exclusion because ECF appears to be better regarded as being a discarded material and regulated as a hazardous waste. The exclusions for comparable fuel and synthesis gas fuel are not addressed or otherwise affected by this proposed rule.

DATES: Comments must be received on or before January 22, 2010. Under the Paperwork Reduction Act, comments on the information collection provisions are best assured of having their full effect if the Office of Management and Budget (OMB) receives a copy of your comments on or before January 7, 2010.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–RCRA–2005–0017, by one of the following methods:

- *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *E-mail: rcra-docket@epa.gov.*
- *Fax:* 202–566–9744.
- *Mail:* RCRA Docket, Environmental Protection Agency, Mailcode: 2822T, 1200 Pennsylvania Ave., NW., Washington, DC 20460. Please include a total of two copies. We request that you also send a separate copy of your comments to the contact person listed below (see **FOR FURTHER INFORMATION CONTACT**). In addition, please mail a copy of your comments on the information collection provisions to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attn: Desk Officer for EPA, 725 17th St., NW., Washington, DC 20503.
- *Hand Delivery:* RCRA Docket, EPA Docket Center (2822T), EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information. Please include a total of two copies. We request that you also send a separate copy of each comment to the contact person listed below (see **FOR FURTHER INFORMATION CONTACT**).

Instructions: Direct your comments to Docket ID No EPA–HQ–RCRA–2005–0017. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comments include information claimed to be Confidential Business Information (CBI) or other information the disclosure of which is restricted by statute. Clearly mark the part or all of the information that you claim to be CBI. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov*, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic

comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket, visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.* We also request that interested parties who would like information they previously submitted to EPA to be considered as part of this action, to identify the relevant information by docket entry numbers and page numbers.

Docket: All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the RCRA Docket, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the RCRA Docket is (202) 566–0270.

FOR FURTHER INFORMATION CONTACT: Mary Jackson, Materials Recovery and Waste Management Division, Office of Resource Conservation and Recovery, Mailcode: 5304P, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (703) 308–8453; fax number: (703) 308–8433; e-mail address: *jackson.mary@epa.gov*.

SUPPLEMENTARY INFORMATION:

General Information

A. Does This Action Apply to Me?

Categories and entities potentially affected by this action include:

EXAMPLES OF POTENTIALLY AFFECTED ENTITIES

NAICS code	Industry description
3251	Basic Chemical Manufacturing.
3241	Petroleum and Coal Products Manufacturing.
4884	Support Activities for Road Transportation.
5622	Waste Treatment and Disposal.
3252	Resin, Synthetic Rubber, and Artificial Synthetic Fibers and Filaments Manufacturing.
3259	Other Chemical Product and Preparation Manufacturing.
3254	Pharmaceutical and Medicine Manufacturing.
9281	National Security and International Affairs.
3255	Paint, Coating, and Adhesive Manufacturing.
5614	Business Support Services.
3273	Cement Manufacturing.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be impacted by this action. This table lists examples of the types of entities EPA is aware of that could potentially be regulated by this action. Other types of entities not listed could also be affected. To determine whether your facility, company, business, organization, etc., is affected by this action, you should examine the applicability criteria in this proposed rule. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

B. What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through *http://www.regulations.gov* or e-mail. Send or deliver information identified as CBI to the following address: Ms. LaShan Haynes, RCRA Document Control Officer, EPA (Mail Code 5305W), Attention Docket ID No. EPA–HQ–RCRA–2005–0017, 1200 Pennsylvania Avenue, NW., Washington DC 20460. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD ROM that you mail to EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with the procedures set forth in 40 CFR part 2.

2. *Tips for Preparing Your Comments.* When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
- Follow directions—The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
- Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Explain your views as clearly as possible,
- Make sure to submit your comments by the comment period deadline identified.

3. *Docket Copying Costs.* You may copy a maximum of 100 pages from any regulatory docket at no charge. Additional copies are 15 cents/page.

4. *How Do I Obtain a Copy of This Document and Other Related Information?* In addition to being available in the docket, an electronic copy of today's proposed rule will also be available on the Worldwide Web (WWW). Following the Administrator's signature, a copy of this document will be posted on the WWW at *http://www.epa.gov/hwcmact.* This Web site also provides other information related

to the NESHAP for hazardous waste combustors.

5. *Index of contents.* The information presented in this preamble is organized as follows:

I. Statutory Authority

The emission-comparable fuel (ECF) regulations were promulgated under the authority of sections 1004 and 2002 of the Solid Waste Disposal Act of 1970, as amended by the Resource Conservation and Recovery Act of 1976 (RCRA), as amended by the Hazardous and Solid Waste Amendments of 1984 (HSWA), 42 U.S.C. 6903 and 6912. Withdrawal of the rule would be issued under the same authority, and hazardous waste fuels are regulated pursuant to section 3004(q) of RCRA.

II. Background

A. What Is the Intent of the Proposed Rule?

This rule proposes to withdraw the conditional exclusion from regulation under subtitle C of RCRA for ECF, as codified at § 261.38.[1] The conditional exclusion states that hazardous secondary materials that meet all of the hazardous constituent specifications applicable to comparable fuel, except concentration limits for oxygenates and hydrocarbons, and that are stored and burned under prescribed conditions, are not discarded and thus, are not solid wastes.

EPA notes, however, that classification of ECF as a non-waste is not legally compelled, and an alternative classification is permissible. As discussed in more detail in the following section, ECF is a hazardous secondary material which can reasonably be regarded as discarded when stored and burned because: (1) The material can have substantially higher concentrations of hazardous oxygenates and hydrocarbons than fuel oil, and thus, lacking physical identity to fossil fuel, combustion of the material may be considered to be similar to incinerating or destroying it, a form of discarding; (2) the exclusion is conditioned on extensive, substantive requirements on burning, similar to the requirements for permitted hazardous waste combustors, which conditions are needed to prevent discard; and (3) the exclusion is conditioned on extensive, substantive requirements on storage, similar to the requirements for permitted hazardous waste storage units. EPA has the authority to adopt conditional exclusions from the definition of solid waste; however, when conditions grow ever more elaborate and extensive and are more and more comparable (or identical) to those required for the management of hazardous waste, the question is raised as to whether the material is discarded because of the necessity for waste management-like conditions on its handling. Put another way, the conditions can become a surrogate for RCRA's cradle-to-grave hazardous waste management system, and the hazardous secondary materials to which such conditions pertain can be classified as discarded. Given the elements of discard involved in combusting ECF, and the extensive waste management-related types of conditions EPA developed for this conditional exclusion, it is now EPA's view, subject to consideration of public comment, that these materials should be classified as solid waste and, when listed or when exhibiting a characteristic, hazardous wastes rather than as products.

This proposal would not affect the exclusions for comparable fuel and synthesis gas fuel that were promulgated in 1998 [2] (also codified in § 261.38), nor is EPA soliciting comment on those exclusions or otherwise reconsidering or reopening them. In addition, this proposal does not affect the clarifications and revisions to the conditions for comparable fuel that EPA promulgated concurrently with the ECF exclusion.[3]

B. Who Will Be Affected by the Proposed Rule?

Entities that generate, burn, and store ECF would be potentially affected by this proposed rule. The basic structure of the exclusion is that ECF is not a solid (and hazardous) waste as generated, and hence is not subject to the subtitle C regulations. Under today's proposal to withdraw the exclusion of ECF, ECF would again be classified as a hazardous waste, and all entities managing such hazardous secondary materials would again be subject to all applicable subtitle C hazardous waste standards. Since the rule was promulgated in December 2008 and became effective in January 2009, and since we are not aware that any States have adopted or applied for authorization for this rule, we would expect that very few facilities, if any, are managing their hazardous secondary materials pursuant to this rule. However, the Agency requests comments on whether any generators or burners are managing ECF pursuant to the terms of the conditional exclusion.

We are also not aware of any commercial hazardous waste combustors that are no longer receiving newly excluded hazardous secondary materials subject to the ECF rule, because the materials are now being managed under the ECF conditional exclusion. To the extent this is occurring, however, the commercial hazardous waste combustors in question would have lost the waste management revenues for those diverted fuels and may have needed to meet their heat input requirements by using other waste fuels or fossil fuels. Under today's proposal to withdraw the ECF exclusion, those hazardous secondary materials that were managed as excluded ECF would again be classified as hazardous waste fuels. Thus, those affected commercial hazardous waste combustors may have the opportunity to provide hazardous waste management services for hazardous secondary materials managed as ECF. However, as noted above, we suspect that very few facilities, if any, are already managing ECF under the conditional exclusion. If that is the case, commercial hazardous waste combustors have likely experienced very little change.

[1] See 73 FR 77954 (December 19, 2008).

[2] See 63 FR 33782 (June 19, 1998).

[3] See 73 FR at 77963–64.

III. Summary of the Proposed Rule

This proposed rule would withdraw the conditional exclusion for ECF under § 261.38, including the exclusion itself in § 261.4(a)(16), specifications and associated conditions applicable to ECF under § 261.38(a), the implementation conditions applicable to ECF under § 261.38(b), the storage and burning conditions for ECF under § 261.38(c), the provisions for failure to comply with the conditions for the ECF exclusion under § 261.38(d)(2), the alternative storage conditions for ECF under § 261.38(e), and the notification of closure of an ECF storage unit under § 261.38(f).

As noted above, this proposed rule would not affect, however, the exclusion for comparable fuel or synthesis gas fuel, including the specifications and associated conditions for these materials under § 261.38(a), the implementation conditions applicable to these materials under § 261.38(b), and the provision for failure to comply with the conditions for exclusion of these materials under § 261.38(d)(1).

Finally, the proposed rule would not affect the clarifications and revisions to the conditions for comparable fuel that EPA promulgated concurrently with the ECF exclusion; specifically: (1) Clarification that comparable fuel that is spilled or leaked and that no longer meets the conditions of the exclusion must be managed as a hazardous waste if it exhibits a characteristic of hazardous waste or if it is otherwise a listed hazardous waste (§ 261.38(b)(15)); (2) clarification that the comparable fuel tank system and container storage units become subject to the RCRA hazardous waste facility standards if not cleaned of liquids and accumulated solids within 90 days of ceasing operations as a comparable fuel storage unit (§ 261.38(b)(13)); (3) waiver of the RCRA closure requirements for tank systems and container storage units that were used only to store hazardous wastes that are subsequently excluded as comparable fuel (§ 261.38(b)(14)); (4) clarification that boiler residues, including bottom ash and emission control residue, from burning comparable fuel would be subject to regulation as hazardous waste if they exhibit a hazardous waste characteristic (§ 261.38(b)(12)); and (5) a condition [4] requiring that the one-time notice by the generator to regulatory officials must include an estimate of the average and maximum monthly and annual quantity of comparable fuel for which an exclusion is claimed (§ 261.38(b)(2)(i)(A)).

IV. Rationale for Proposing To Revoke the Exclusion for ECF

A. ECF May Be Classified as a Waste Rather than as a Product

Since 1998, hazardous secondary materials (*i.e.,* spent materials, sludges, byproducts, and off-specification commercial chemical products) which have fuel value and whose hazardous constituent levels are comparable to those found in fuel oil that could be burned in their place have been excluded from the definition of solid waste (and, hence, cannot be hazardous waste). See § 261.38.[5] These materials are called comparable fuels.

On December 19, 2008,[6] EPA added an additional group of hazardous secondary materials to the exclusions in § 261.38. These are hazardous secondary materials that, as generated, are handled as fuel products through all phases of management. The rule sought to assure that this will occur through a series of conditions on the circumstances of their storage and burning, and based on their substantial physical identity—except for their level of hydrocarbons and oxygenates—with fuel oil. These hazardous secondary materials must meet all of the hazardous constituent specifications for comparable fuel, except those for oxygenates and hydrocarbons. These excluded fuels are termed ''emission-comparable fuel'' (or ''ECF'') because the emissions from an industrial boiler burning these hazardous secondary materials under the conditions of the exclusion are comparable to the emissions from an industrial boiler burning fuel oil, the fossil fuel for which ECF could substitute. See 73 FR at 77956.

However, ECF is a hazardous secondary material because the material can have substantially higher concentrations of hazardous oxygenates and hydrocarbons than fuel oil, and thus, lacking physical identity to fossil fuel, can also be reasonably considered to be discarded when burned (and when accumulated/stored prior to burning). Hazardous oxygenates and hydrocarbons contribute fuel value (and are often found at some level in petroleum-based fuel products albeit less than allowed in ECF); however, several of these compounds (*e.g.,* polycyclic aromatic hydrocarbons, naphthalene, benzene, and acrolein) are also highly toxic [7] to human health and to the environment. EPA based the ECF exclusion on its view that these hazardous compounds would be destroyed in the combustion process, to the extent that their concentration in the emissions would be comparable to that in the emissions from the combustion of fuel oil in industrial boilers. However, to ensure comparable emissions, EPA conditioned the exclusion on extensive, substantive requirements on burning that are in fact similar to the requirements for permitted hazardous waste combustors—including conditions on the type of unit in which ECF can be combusted, constituent-by-constituent feedrate limits controlling the amount of ECF which may be burned (some of which are miniscule),[8] and boiler operating conditions (*e.g.,* CO control, dioxin/furan control, automatic ECF cutoff systems, and operator training). See § 261.38(c)(2). In the case of ECF, because it was necessary to preclude discard by meeting conditions tantamount to satisfying the substantive subtitle C regulatory regime, EPA concludes that the hazardous secondary material is more waste-like than product-like.

Similarly, the exclusion contains extensive conditions on storage that are virtually identical to the requirements for permitted hazardous waste storage units. See § 261.38(c)(1). That is, while EPA has the authority to establish storage conditions in order to identify hazardous secondary materials that are not discarded, the collection of storage conditions on products and by-products that EPA adopted for ECF to prevent discard are so similar to the requirements for hazardous waste storage units under Subparts I and J of Part 264 that they become a surrogate to those required for the management of hazardous waste, and thus, the material may be more waste-like than product-like, and can reasonably be classified as

[4] Please note that this condition applies prospectively to generators that newly claim the comparable fuel exclusion after December 19, 2008 and to generators that must submit a revised notification after December 19, 2008 because of a substantive change in the information required by the notice.

[5] See 63 FR 33782 (June 19, 1998).

[6] See 73 FR 77954.

[7] USEPA, ''Final Technical Support Document for the Exclusion of Emission Comparable Fuels,'' November 2008, Section 2.4.

[8] We note that the maximum firing rate for ECF containing a polynuclear aromatic hydrocarbon (among the hydrocarbons which can be present in unlimited concentrations in ECF) when the ECF is co-fired with natural gas is 0.55% on a heat input basis (i.e., the ECF can contribute only 0.55% of the heat input to the boiler), and the maximum firing rate for such an ECF would be virtually zero if it were to be co-fired with fuel oil. See USEPA, ''Final Technical Support Document for the Exclusion of Emission Comparable Fuels,'' November 2008, Table 6–5. These feedrate restrictions are needed to ensure that emissions from burning ECF are comparable to emissions from burning fuel oil, but are so restrictive that they indicate the hazardous secondary material is more waste-like than product-like since virtually none of it could be burned in order to preserve emission comparability.

discarded. Put another way, if it is necessary to preclude discard by meeting conditions tantamount to satisfying the substantive subtitle C regulatory regime, then the secondary material may be classified as a waste in the first instance.

B. Why EPA Now Proposes To Reclassify ECF as a Waste

We have explained how ECF could be classified as a waste rather than as a product. We explain here the rationale underlying EPA's proposal choosing to reclassify ECF as a waste.

The fundamental premise of the ECF rule is that ECF is no more hazardous than burning fuel oil, because combustion of this material will have comparable emissions. However, to ensure that the material does not pose greater risks, EPA felt compelled to promulgate a very detailed set of conditions—the equivalent of a detailed regulatory scheme—for both the storage and combustion of ECF. As noted, the conditions of the exclusion are virtually the same in many critical instances as the substantive rules which apply while storing and combusting hazardous waste. For example, EPA concluded that burning ECF can lead to greater concentrations of hazardous constituents in air emissions under ''normal'' combustion conditions. Therefore, EPA imposed special design and operational conditions to ensure effective combustion of ECF, which are similar to the requirements for industrial boilers burning hazardous wastes under the exemption from stack emissions testing for destruction and removal efficiency (DRE) provided by 40 CFR 266.110. Therefore, upon further consideration, the Agency believes that burning of ECF under the conditional exclusion is really not much different from burning hazardous waste in a hazardous waste combustion unit. We note that a number of commenters on the proposed rule raised these same concerns.

As a matter of policy, the nature of these requirements related to burning ECF is such that, in EPA's view, they are most appropriately applied through a careful review process, overseen by the regulator with an opportunity for public comment. For example, a formal review of an ECF burner's operations would ensure that the boiler meets the design conditions, and that the required operating limits (*e.g.,* CO limit, ECF feedrate limit, boiler load, gas temperature for dioxin/furan control) are properly monitored and linked to an automatic ECF feed cutoff system. However, facilities that burn ECF, under the ECF rule, would satisfy these conditions absent the formal process to apply for and obtain an operating permit. That is, facilities would be allowed to comply with this complicated set of operating conditions without any type of review process. Although the Agency contemplated that the authorized permitting authority would ensure compliance through enforcement oversight rather than through the permitting process, the Agency now believes it is important that each ECF burner undergoes a thorough review on the operation of the combustion unit as part of the existing subtitle C permitting structure. Indeed, EPA, on reconsideration (but subject to consideration of public comment), has concluded that the ECF rule will actually require more resources and more attention from the regulatory agency than a subtitle C approach to reach a comparable level of assurance that appropriate combustion conditions are met. Under the ECF rule, the burden would be on State enforcement personnel to ensure that the conditions are met after the fact, while under a permit system, the burden is on the regulated entity to demonstrate to the regulatory authority that the terms of the regulations are met. In many cases, regulations that are directly enforced make sense, but where regulations govern specialized combustion conditions, and where technical judgments are important in determining compliance, the permit process provides important protections.

With respect to storage, ECF contains higher (potentially unlimited) concentrations of hazardous hydrocarbons and oxygenates than fuel oil, and so poses a greater storage hazard than fuel oil. In addition, ECF may often behave as a dense non-aqueous phase liquid and be more difficult to contain than fuel oil should it leak or spill. Several of these hazardous hydrocarbons and oxygenates are also highly volatile, raising concern about the hazard of fugitive air emissions and resulting in the need for fugitive emission controls. In addition, since storage units are not subject to closure and financial assurance conditions under the present rule, ECF storage units may be improperly closed, which could result in spills or leaks. All of these factors are reasons why a thorough review on the operation of the storage units should be undertaken as part of the existing subtitle C permitting structure, as opposed to a self-implementing structure. Thus, given all of these potentials for harm in storage—all of which are classic damage pathways for waste storage—EPA is proposing to remove the exclusion for ECF when ECF is stored.

For all these reasons, EPA now concludes, subject to consideration of public comment, that it is more straightforward and more appropriate simply to apply the hazardous waste rules directly, i.e., to reclassify ECF as solid waste subject to a hazardous waste determination and, if hazardous, the RCRA cradle-to-grave management system.

V. State Authority

A. Applicability of the Rule in Authorized States

Under section 3006 of RCRA, EPA may authorize qualified States to administer their own hazardous waste programs in lieu of the Federal program within the State. Following authorization, EPA retains enforcement authority under sections 3008, 3013, and 7003 of RCRA, although authorized States have primary enforcement responsibility. The standards and requirements for State authorization are found at 40 CFR part 271.

Prior to enactment of the Hazardous and Solid Waste Amendments of 1984 (HSWA), a State with final RCRA authorization administered its hazardous waste program entirely in lieu of EPA administering the Federal program in that State. The Federal requirements no longer applied in the authorized State, and EPA could not issue permits for any facilities in that State, since only the State was authorized to issue RCRA permits. When new, more stringent Federal requirements were promulgated, the State was obligated to enact equivalent authorities within specified time frames. However, the new Federal requirements did not take effect in an authorized State until the State adopted the Federal requirements as State law.

In contrast, under RCRA section 3006(g) (42 U.S.C. 6926(g)), which was added by HSWA, new requirements and prohibitions imposed under HSWA authority take effect in authorized States at the same time that they take effect in unauthorized States. EPA is directed by the statute to implement these requirements and prohibitions in authorized States, including the issuance of permits, until the State is granted authorization to do so. While States must still adopt HSWA related provisions as State law to retain final authorization, EPA implements the HSWA provisions in authorized States until the States do so.

Authorized States are required to modify their programs only when EPA enacts Federal requirements that are

more stringent or broader in scope than the existing Federal requirements. RCRA section 3009 allows the States to impose standards more stringent than those in the Federal program (see also 40 CFR 271.1). Therefore, authorized States may, but are not required to, adopt Federal regulations, both HSWA and non-HSWA, that are considered less stringent than previous Federal regulations.

B. Effect on State Authorization

The provisions in today's notice are not being proposed under the authority of HSWA and are considered to be more stringent than current requirements. States that have adopted the exclusion would be required to modify their programs to remove the exclusion for ECF because they must conform to the Federal regulations that are more stringent than the authorized State regulations. States that adopted the comparable fuel exclusion promulgated on June 19, 1998 and codified at § 261.38, but that have not adopted the ECF exclusion, will still need to revise their programs to adopt the more stringent conditions applicable to comparable fuel (see 73 FR at 77963–64) that were promulgated concurrently with the ECF exclusion on December 19, 2008.

Section 271.21(e)(2) of EPA's State authorization regulations (40 CFR part 271) requires that States with final authorization modify their programs to reflect Federal program changes and submit the modifications to EPA for approval. The deadline by which the States will need to modify their programs is determined by the date of promulgation of a final rule in accordance with § 271.21(e)(2). Once EPA approves the modification, the State requirements would become RCRA subtitle C requirements.

VI. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order (EO) 12866 (58 FR 51735, October 4, 1993), this action is a ''significant regulatory action.'' Pursuant to the terms of Executive Order 12866, the Agency, in conjunction with the Office of Management and Budget (OMB), has determined that this proposed rule is a significant regulatory action because it proposes to withdraw a rule that OMB previously determined contains novel policy issues, as defined under part 3(f)(4) of the Order. Accordingly, EPA submitted this action to OMB for review under EO 12866. Any changes made in response to OMB recommendations have been documented in the docket for this action.

This proposed withdrawal of the RCRA Conditional Exclusion for ECF would result in lost benefits to society. The economic assessment (Assessment) [9] prepared in support of the December 2008 final rule estimated total annual net social benefits (*i.e.,* net resource savings) of $13.4 million per year, assuming all authorized States were to adopt the rule (which as noted earlier, we do not believe has occurred). The benefits estimate was based on the best available data and information at the time of the analysis. However, upon further research and assessment, we have determined that one of our key analytical assumptions,[10] derived from data reporting limitations, may not reflect actual waste management patterns, as reported. Adjusting for this discrepancy results in a revised annual net social benefits estimate of approximately $6.6 million, again assuming that the current rule were to be adopted by all authorized States.[11] Actual net social benefits are likely lower since we believe most States have not adopted the rule. This adjustment indicates that the net annual social benefits lost by withdrawing the final rule would not be as large as originally estimated.[12]

B. Paperwork Reduction Act

The information collection requirements in this proposed rule have been submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* The Information Collection Request (ICR) document prepared by EPA has been assigned EPA ICR number 1361.14. Withdrawing the ECF exclusion would result in an increase in the reporting and recordkeeping burden for ECF generators and burners, back to the level prior to promulgation of the exclusion. That is, under the ECF conditional exclusion, because ECF was no longer classified as a hazardous waste, the generator and burner would not be required to comply with the paperwork, reporting, and recordkeeping requirements under the subtitle C hazardous waste regulations. However, ECF generators and burners would be subject to an annual public reporting and recordkeeping burden for the collection of information required under the conditional exclusion. Thus, overall, the reporting and recordkeeping burden for ECF generators and burners resulted in a net annual reduction of 32,899 hours (assuming that all authorized States adopted the rule, which has not occurred) and a savings of $1.3 million in capital and operation and maintenance costs (based on the same assumption). Therefore, withdrawing the ECF conditional exclusion would result in a reporting and recordkeeping burden of 32,899 hours and a cost of $1.3 million in capital, and operation and maintenance costs, assuming full adoption by authorized States. Since we believe this has not occurred, the new burden would be far less. If authorized States have not fully adopted the rule, withdrawing the ECF conditional exclusion would not change the reporting and recordkeeping burden from what existed prior to promulgation of the conditional exclusion. OMB has previously approved the information collection requirements contained in the existing regulations at 40 CFR 261.38 under the provisions of the *Paperwork Reduction Act,* 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2050–0073. Burden is defined at 5 CFR 1320.3(b).

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

To comment on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, EPA has established a public docket for this rule, which includes this ICR, under Docket ID number EPA–HQ–RCRA–2005–0017. Submit any comments related to the ICR to EPA and OMB. See **ADDRESSES** section at the beginning of this notice for where to submit comments to EPA. Send comments to OMB at the Office of Information and Regulatory Affairs, Office of Management and Budget, 725

[9] USEPA, ''Assessment of the Potential Costs, Benefits, and Other Impacts of the Expansion of the RCRA Comparable Fuel Exclusion—Final Rule,'' May 14, 2008.

[10] Our primary data source, USEPA, ''2005 National Biennial Report,'' does not identify a management method code for wastes that are combusted in an incinerator and where the heating value of the wastes is used beneficially in lieu of fossil or other fuels to combust other waste with little or no heating value. Thus, the vast majority of the waste that we identify as likely to be excluded as ECF, and which is currently combusted in incinerators, may already be burned for energy recovery.

[11] USEPA, ''Revised Assessment of the Potential Costs, Benefits, and Other Impacts of the Expansion of the RCRA Comparable Fuel Exclusion—Final Rule,'' July 15, 2009.

[12] USEPA, ''Assessment of the Potential Costs, Benefits, and Other Impacts of the Proposed Withdrawal of the Expansion of the RCRA Comparable Fuel Exclusion—Final Rule,'' July 15, 2009.

17th Street, NW., Washington, DC 20503, Attention: Desk Officer for EPA. Since OMB is required to make a decision concerning the ICR between 30 and 60 days after December 8, 2009, a comment to OMB is best assured of having its full effect if OMB receives it by January 7, 2010. The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of this rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of this proposed rule on small entities, I certify that this action would not have a significant economic impact on a substantial number of small entities. In determining whether a rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant adverse economic impact on small entities, since the primary purpose of the regulatory flexibility analyses is to identify and address regulatory alternatives ''which minimize any significant economic impact of the rule on small entities.'' 5 U.S.C. 603 and 604. Thus, an agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, or otherwise has a positive economic effect on all of the small entities subject to the rule.

We have determined that the affected ECF generators are not owned by small governmental jurisdictions or nonprofit organizations. Therefore, only small businesses were analyzed for small entity impacts. For the purposes of the impact analyses, small entity is defined either by the number of employees or by the dollar amount of sales. The level at which a business is considered small is determined for each North American Industrial Classification System (NAICS) code by the Small Business Administration.

This rule, as proposed, is projected to result in increased costs to companies that may have started to use the conditional exclusion, as identified in the ECF Final Rule, although we suspect that very few facilities, if any, have begun to comply with this rule. However, the [reversed] cost impacts to potentially affected entities are not expected to be significant, as discussed under the Regulatory Flexibility section of the May 14, 2008 Assessment document.[13] As a result, the rule would not result in significant adverse economic impacts to affected small entities. We continue to be interested in the potential impacts of the proposed rule on small entities and welcome comments on issues related to such impacts.

D. Unfunded Mandates Reform Act

This proposed rule does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year. Total annual cost impacts of this action, as proposed, are not expected to exceed $6.6 million. Thus, this proposed rule is not subject to the requirements of sections 202 or 205 of UMRA.

This proposed rule is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. No small governments are known to own or manage any of the affected entities.

E. Executive Order 13132: Federalism

This action does not have Federalism implications. It would not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This action primarily and directly affects generators and burners of ECF. There are no State and local government bodies that would incur direct compliance costs by this rulemaking. Thus, Executive Order 13132 does not apply to this proposed rule.

In the spirit of Executive Order 13132 and consistent with EPA policy to promote communications between EPA and State and local governments, EPA specifically solicits comment on this proposed rule from State and local officials.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). This proposed rule would neither impose substantial direct compliance costs on tribal governments nor preempt tribal law. Thus, Executive Order 13175 does not apply to this action.

EPA did not consult directly with representatives of Tribal governments in the process of developing this proposal. Thus, EPA solicits comments on this proposed rule from Tribal officials.

G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

This action is not subject to EO 13045 (62 F.R. 19885, April 23, 1997) because it is not economically significant as defined in EO 12866, and because the Agency does not have reason to believe the environmental health or safety risks addressed by this proposed action will present a disproportionate risk to children.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution or Usage

This proposed rule is not a ''significant energy action'' as defined in Executive Order 13211 (66 FR 28355, May 22, 2001)), because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

I. National Technology Transfer Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Public Law 104–113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through OMB, explanations

[13] USEPA, ''Assessment of the Potential Costs, Benefits, and Other Impacts of the Expansion of the RCRA Comparable Fuel Exclusion—Final Rule,'' May 14, 2008.

when the Agency decides not to use available and applicable voluntary consensus standards.

Because EPA is proposing to withdraw the conditional exclusion for ECF under § 261.38, EPA is not considering the use of any voluntary consensus standards.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order (EO) 12898 (59 FR 7629, Feb. 16, 1994) establishes Federal executive policy on environmental justice. Its main provision directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA has determined that this proposed rule would not have disproportionately high and/or adverse human health or environmental effects on minority or low-income populations because it would require ECF to be managed under the RCRA Subtitle C hazardous waste regulations, thereby potentially reducing exposures to the public, including to minority and low-income populations.

List of Subjects in 40 CFR Part 261

Environmental protection, Hazardous waste, Recycling, Reporting and recordkeeping requirements.

Dated: November 30, 2009.

Lisa P. Jackson,

Administrator.

For the reasons set out in the preamble, title 40, chapter I, of the Code of Federal Regulations is proposed to be amended as follows:

PART 261—IDENTIFICATION AND LISTING OF HAZARDOUS WASTE

1. The authority citation for part 261 continues to read as follows:

Authority: 42 U.S.C. 6903, 6912(b), 6925.

2. Section 261.4 is amended by revising paragraph (a)(16) to read as follows:

§ 261.4 Exclusions.

(a) * * *

(16) Comparable fuels or comparable syngas fuels that meet the requirements of § 261.38.

* * * * *

3. Section 261.38 is revised to read as follows:

§ 261.38 Exclusion of comparable fuel and syngas fuel.

(a) *Specifications for excluded fuels.* Wastes that meet the specifications for comparable fuel or syngas fuel under paragraphs (a)(1) or (a)(2) of this section, respectively, and the other requirements of this section, are not solid wastes.

(1) *Comparable fuel specifications.*—(i) *Physical specifications*—(A) *Heating value.* The heating value must exceed 5,000 BTU/lbs. (11,500 J/g).

(B) *Viscosity.* The viscosity must not exceed: 50 cS, as-fired.

(ii) *Constituent specifications.* For compounds listed in Table 1 to this section, the specification levels and, where non-detect is the specification, minimum required detection limits are: (see Table 1 of this section).

(2) *Synthesis gas fuel specifications.* Synthesis gas fuel (*i.e.,* syngas fuel) that is generated from hazardous waste must:

(i) Have a minimum Btu value of 100 Btu/Scf;

(ii) Contain less than 1 ppmv of total halogen;

(iii) Contain less than 300 ppmv of total nitrogen other than diatomic nitrogen (N_2);

(iv) Contain less than 200 ppmv of hydrogen sulfide; and

(v) Contain less than 1 ppmv of each hazardous constituent in the target list of appendix VIII constituents of this part.

(3) *Blending to meet the specifications. (i)* Hazardous waste shall not be blended to meet the comparable fuel specification under paragraph (a)(1) of this section, except as provided by paragraph (a)(3)(ii) of this section:

(ii) *Blending to meet the viscosity specification.* A hazardous waste blended to meet the viscosity specification for comparable fuel shall:

(A) As generated and prior to any blending, manipulation, or processing, meet the constituent and heating value specifications of paragraphs (a)(1)(i)(A) and (a)(1)(ii) of this section;

(B) Be blended at a facility that is subject to the applicable requirements of parts 264, 265, or 267 or § 262.34 of this chapter; and

(C) Not violate the dilution prohibition of paragraph (a)(6) of this section.

(4) *Treatment to meet the comparable fuel specifications.* (i) A hazardous waste may be treated to meet the specifications for comparable fuel set forth in paragraph (a)(1) of this section provided the treatment:

(A) Destroys or removes the constituent listed in the specification or raises the heating value by removing or destroying hazardous constituents or materials;

(B) Is performed at a facility that is subject to the applicable requirements of parts 264, 265, or 267, or § 262.34 of this chapter; and

(C) Does not violate the dilution prohibition of paragraph (a)(6) of this section.

(ii) Residuals resulting from the treatment of a hazardous waste listed in subpart D of this part to generate a comparable fuel remain a hazardous waste.

(5) *Generation of a syngas fuel.* (i) A syngas fuel can be generated from the processing of hazardous wastes to meet the exclusion specifications of paragraph (a)(2) of this section provided the processing:

(A) Destroys or removes the constituent listed in the specification or raises the heating value by removing or destroying constituents or materials;

(B) Is performed at a facility that is subject to the applicable requirements of parts 264, 265, or 267, or § 262.34 of this chapter or is an exempt recycling unit pursuant to § 261.6(c); and

(C) Does not violate the dilution prohibition of paragraph (a)(6) of this section.

(ii) Residuals resulting from the treatment of a hazardous waste listed in subpart D of this part to generate a syngas fuel remain a hazardous waste.

(6) *Dilution prohibition.* No generator, transporter, handler, or owner or operator of a treatment, storage, or disposal facility shall in any way dilute a hazardous waste to meet the specifications of paragraphs (a)(1)(i)(A) or (a)(1)(ii) of this section for comparable fuel, or paragraph (a)(2) of this section for syngas.

(b) *Implementation*—(1) *General.* (i) Wastes that meet the specifications provided by paragraph (a) of this section for comparable fuel or syngas fuel are excluded from the definition of solid waste provided that the conditions under this section are met. For purposes of this section, such materials are called excluded fuel; the person claiming and qualifying for the exclusion is called the excluded fuel generator and the person burning the excluded fuel is called the excluded fuel burner.

(ii) The person who generates the excluded fuel must claim the exclusion by complying with the conditions of this section and keeping records necessary to document compliance with those conditions.

(2) *Notices*—(i) *Notices to State RCRA and CAA Directors in authorized States or regional RCRA and CAA Directors in unauthorized States.* (A) The generator

must submit a one-time notice, except as provided by paragraph (b)(2)(i)(C) of this section, to the Regional or State RCRA and CAA Directors, in whose jurisdiction the exclusion is being claimed and where the excluded fuel will be burned, certifying compliance with the conditions of the exclusion and providing the following documentation:

(1) The name, address, and RCRA ID number of the person/facility claiming the exclusion;

(2) The applicable EPA Hazardous Waste Code(s) that would otherwise apply to the excluded fuel;

(3) The name and address of the units meeting the requirements of paragraphs (b)(3) and (c) of this section, that will burn the excluded fuel;

(4) An estimate of the average and maximum monthly and annual quantity of material for which an exclusion would be claimed, except as provided by paragraph (b)(2)(i)(C) of this section; and

(5) The following statement, which shall be signed and submitted by the person claiming the exclusion or his authorized representative:

Under penalty of criminal and civil prosecution for making or submitting false statements, representations, or omissions, I certify that the requirements of 40 CFR 261.38 have been met for all comparable fuels identified in this notification. Copies of the records and information required at 40 CFR 261.38(b)(8) are available at the generator's facility. Based on my inquiry of the individuals immediately responsible for obtaining the information, the information is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

(B) If there is a substantive change in the information provided in the notice required under this paragraph, the generator must submit a revised notification.

(C) Excluded fuel generators must include an estimate of the average and maximum monthly and annual quantity of material for which an exclusion would be claimed only in notices submitted after December 19, 2008 for newly excluded fuel or for revised notices as required by paragraph (b)(2)(i)(B) of this section.

(ii) *Public notice.* Prior to burning an excluded fuel, the burner must publish in a major newspaper of general circulation local to the site where the fuel will be burned, a notice entitled ''Notification of Burning a Fuel Excluded Under the Resource Conservation and Recovery Act'' and containing the following information:

(A) Name, address, and RCRA ID number of the generating facility(ies);

(B) Name and address of the burner and identification of the unit(s) that will burn the excluded fuel;

(C) A brief, general description of the manufacturing, treatment, or other process generating the excluded fuel;

(D) An estimate of the average and maximum monthly and annual quantity of the excluded fuel to be burned; and

(E) Name and mailing address of the Regional or State Directors to whom the generator submitted a claim for the exclusion.

(3) *Burning.* The exclusion applies only if the fuel is burned in the following units that also shall be subject to Federal/State/local air emission requirements, including all applicable requirements implementing section 112 of the Clean Air Act:

(i) Industrial furnaces as defined in § 260.10 of this chapter;

(ii) Boilers, as defined in § 260.10 of this chapter, that are further defined as follows:

(A) Industrial boilers located on the site of a facility engaged in a manufacturing process where substances are transformed into new products, including the component parts of products, by mechanical or chemical processes; or

(B) Utility boilers used to produce electric power, steam, heated or cooled air, or other gases or fluids for sale;

(iii) Hazardous waste incinerators subject to regulation under subpart O of parts 264 or 265 of this chapter and applicable CAA MACT standards.

(iv) Gas turbines used to produce electric power, steam, heated or cooled air, or other gases or fluids for sale.

(4) *Fuel analysis plan for generators.* The generator of an excluded fuel shall develop and follow a written fuel analysis plan which describes the procedures for sampling and analysis of the material to be excluded. The plan shall be followed and retained at the site of the generator claiming the exclusion.

(i) At a minimum, the plan must specify:

(A) The parameters for which each excluded fuel will be analyzed and the rationale for the selection of those parameters;

(B) The test methods which will be used to test for these parameters;

(C) The sampling method which will be used to obtain a representative sample of the excluded fuel to be analyzed;

(D) The frequency with which the initial analysis of the excluded fuel will be reviewed or repeated to ensure that the analysis is accurate and up to date; and

(E) If process knowledge is used in the determination, any information prepared by the generator in making such determination.

(ii) For each analysis, the generator shall document the following:

(A) The dates and times that samples were obtained, and the dates the samples were analyzed;

(B) The names and qualifications of the person(s) who obtained the samples;

(C) A description of the temporal and spatial locations of the samples;

(D) The name and address of the laboratory facility at which analyses of the samples were performed;

(E) A description of the analytical methods used, including any clean-up and sample preparation methods;

(F) All quantitation limits achieved and all other quality control results for the analysis (including method blanks, duplicate analyses, matrix spikes, etc.), laboratory quality assurance data, and the description of any deviations from analytical methods written in the plan or from any other activity written in the plan which occurred;

(G) All laboratory results demonstrating whether the exclusion specifications have been met; and

(H) All laboratory documentation that support the analytical results, unless a contract between the claimant and the laboratory provides for the documentation to be maintained by the laboratory for the period specified in paragraph (b)(9) of this section and also provides for the availability of the documentation to the claimant upon request.

(iii) Syngas fuel generators shall submit for approval, prior to performing sampling, analysis, or any management of an excluded syngas fuel, a fuel analysis plan containing the elements of paragraph (b)(4)(i) of this section to the appropriate regulatory authority. The approval of fuel analysis plans must be stated in writing and received by the facility prior to sampling and analysis to demonstrate the exclusion of a syngas. The approval of the fuel analysis plan may contain such provisions and conditions as the regulatory authority deems appropriate.

(5) *Excluded fuel sampling and analysis*—(i) *General.* For wastes for which an exclusion is claimed under the specifications provided by paragraphs (a)(1) or (a)(2) of this section, the generator of the waste must test for all the constituents in appendix VIII to this part, except those that the generator determines, based on testing or knowledge, should not be present in the fuel. The generator is required to document the basis of each determination that a constituent with an applicable specification should not be present. The generator may not

determine that any of the following categories of constituents with a specification in Table 1 to this section should not be present:

(A) A constituent that triggered the toxicity characteristic for the constituents that were the basis for listing the hazardous secondary material as a hazardous waste, or constituents for which there is a treatment standard for the waste code in 40 CFR 268.40;

(B) A constituent detected in previous analysis of the waste;

(C) Constituents introduced into the process that generates the waste; or

(D) Constituents that are byproducts or side reactions to the process that generates the waste.

Note to paragraph (b)(5)(i): Any claim under this section must be valid and accurate for all hazardous constituents; a determination not to test for a hazardous constituent will not shield a generator from liability should that constituent later be found in the excluded fuel above the exclusion specifications.

(ii) *Use of process knowledge.* For each waste for which the comparable fuel or syngas exclusion is claimed where the generator of the excluded fuel is not the original generator of the hazardous waste, the generator of the excluded fuel may not use process knowledge pursuant to paragraph (b)(5)(i) of this section and must test to determine that all of the constituent specifications of paragraphs (a)(1) and (a)(2) of this section, as applicable, have been met.

(iii) The excluded fuel generator may use any reliable analytical method to demonstrate that no constituent of concern is present at concentrations above the specification levels. It is the responsibility of the generator to ensure that the sampling and analysis are unbiased, precise, and representative of the excluded fuel. For the fuel to be eligible for exclusion, a generator must demonstrate that:

(A) The 95% upper confidence limit of the mean concentration for each constituent of concern is not above the specification level; and

(B) The analyses could have detected the presence of the constituent at or below the specification level.

(iv) Nothing in this paragraph preempts, overrides or otherwise negates the provision in § 262.11 of this chapter, which requires any person who generates a solid waste to determine if that waste is a hazardous waste.

(v) In an enforcement action, the burden of proof to establish conformance with the exclusion specification shall be on the generator claiming the exclusion.

(vi) The generator must conduct sampling and analysis in accordance with the fuel analysis plan developed under paragraph (b)(4) of this section.

(vii) *Viscosity condition for comparable fuel.* (A) Excluded comparable fuel that has not been blended to meet the kinematic viscosity specification shall be analyzed as-generated.

(B) If hazardous waste is blended to meet the kinematic viscosity specification for comparable fuel, the generator shall:

(*1*) Analyze the hazardous waste as-generated to ensure that it meets the constituent and heating value specifications of paragraph (a)(1) of this section; and

(*2*) After blending, analyze the fuel again to ensure that the blended fuel meets all comparable fuel specifications.

(viii) Excluded fuel must be re-tested, at a minimum, annually and must be retested after a process change that could change its chemical or physical properties in a manner than may affect conformance with the specifications.

(6) [Reserved]

(7) *Speculative accumulation.* Excluded fuel must not be accumulated speculatively, as defined in § 261.1(c)(8).

(8) *Operating record.* The generator must maintain an operating record on site containing the following information:

(i) All information required to be submitted to the implementing authority as part of the notification of the claim:

(A) The owner/operator name, address, and RCRA ID number of the person claiming the exclusion;

(B) For each excluded fuel, the EPA Hazardous Waste Codes that would be applicable if the material were discarded; and

(C) The certification signed by the person claiming the exclusion or his authorized representative.

(ii) A brief description of the process that generated the excluded fuel. If the comparable fuel generator is not the generator of the original hazardous waste, provide a brief description of the process that generated the hazardous waste;

(iii) The monthly and annual quantities of each fuel claimed to be excluded;

(iv) Documentation for any claim that a constituent is not present in the excluded fuel as required under paragraph (b)(5)(i) of this section;

(v) The results of all analyses and all detection limits achieved as required under paragraph (b)(4) of this section;

(vi) If the comparable fuel was generated through treatment or blending, documentation of compliance with the applicable provisions of paragraphs (a)(3) and (a)(4) of this section;

(vii) If the excluded fuel is to be shipped off-site, a certification from the burner as required under paragraph (b)(10) of this section;

(viii) The fuel analysis plan and documentation of all sampling and analysis results as required by paragraph (b)(4) of this section; and

(ix) If the generator ships excluded fuel off-site for burning, the generator must retain for each shipment the following information on-site:

(A) The name and address of the facility receiving the excluded fuel for burning;

(B) The quantity of excluded fuel shipped and delivered;

(C) The date of shipment or delivery;

(D) A cross-reference to the record of excluded fuel analysis or other information used to make the determination that the excluded fuel meets the specifications as required under paragraph (b)(4) of this section; and

(E) A one-time certification by the burner as required under paragraph (b)(10) of this section.

(9) *Records retention.* Records must be maintained for a period of three years.

(10) *Burner certification to the generator.* Prior to submitting a notification to the State and Regional Directors, a generator of excluded fuel who intends to ship the excluded fuel off-site for burning must obtain a one-time written, signed statement from the burner:

(i) Certifying that the excluded fuel will only be burned in an industrial furnace, industrial boiler, utility boiler, or hazardous waste incinerator, as required under paragraph (b)(3) of this section;

(ii) Identifying the name and address of the facility that will burn the excluded fuel; and

(iii) Certifying that the State in which the burner is located is authorized to exclude wastes as excluded fuel under the provisions of this section.

(11) *Ineligible waste codes.* Wastes that are listed as hazardous waste because of the presence of dioxins or furans, as set out in appendix VII of this part, are not eligible for these exclusions, and any fuel produced from or otherwise containing these wastes remains a hazardous waste subject to the full RCRA hazardous waste management requirements.

(12) *Regulatory status of boiler residues.* Burning excluded fuel that was otherwise a hazardous waste listed

under §§ 261.31 through 261.33 does not subject boiler residues, including bottom ash and emission control residues, to regulation as derived-from hazardous wastes.

(13) *Residues in containers and tank systems upon cessation of operations.* (i) Liquid and accumulated solid residues that remain in a container or tank system for more than 90 days after the container or tank system ceases to be operated for storage or transport of excluded fuel product are subject to regulation under parts 262 through 265, 267, 268, 270, 271, and 124 of this chapter.

(ii) Liquid and accumulated solid residues that are removed from a container or tank system after the container or tank system ceases to be operated for storage or transport of excluded fuel product are solid wastes subject to regulation as hazardous waste if the waste exhibits a characteristic of hazardous waste under §§ 261.21 through 261.24 or if the fuel were otherwise a hazardous waste listed under §§ 261.31 through 261.33 when the exclusion was claimed.

(iii) Liquid and accumulated solid residues that are removed from a container or tank system and which do not meet the specifications for exclusion under paragraphs (a)(1) or (a)(2) of this section are solid wastes subject to regulation as hazardous waste if:

(A) The waste exhibits a characteristic of hazardous waste under §§ 261.21 through 261.24; or

(B) The fuel were otherwise a hazardous waste listed under §§ 261.31 through 261.33. The hazardous waste code for the listed waste applies to these liquid and accumulated solid resides.

(14) *Waiver of RCRA closure requirements.* Interim status and permitted storage and combustion units, and generator storage units exempt from the permit requirements under § 262.34 of this chapter, are not subject to the closure requirements of 40 CFR parts 264, 265, and 267 provided that the storage and combustion unit has been used to manage only hazardous waste that is subsequently excluded under the conditions of this section, and that afterward will be used only to manage fuel excluded under this section.

(15) *Spills and leaks.* (i) Excluded fuel that is spilled or leaked and that therefore no longer meets the conditions of the exclusion is discarded and must be managed as a hazardous waste if it exhibits a characteristic of hazardous waste under §§ 261.21 through 261.24 or if the fuel were otherwise a hazardous waste listed in §§ 261.31 through 261.33.

(ii) For excluded fuel that would have otherwise been a hazardous waste listed in §§ 261.31 through 261.33 and which is spilled or leaked, the hazardous waste code for the listed waste applies to the spilled or leaked material.

(16) Nothing in this section preempts, overrides, or otherwise negates the provisions in CERCLA Section 103, which establish reporting obligations for releases of hazardous substances, or the Department of Transportation requirements for hazardous materials in 49 CFR parts 171 through 180.

(c) *Failure to comply with the conditions of the exclusion.* An excluded fuel loses its exclusion if any person managing the fuel fails to comply with the conditions of the exclusion under this section, and the material must be managed as a hazardous waste from the point of generation. In such situations, EPA or an authorized State agency may take enforcement action under RCRA section 3008(a).

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Table 1 to § 261.38--Detection and Detection Limit Values for Comparable Fuel Specification

Chemical name	CAS No.	Concentration Limit (mg/kg at 10,000 Btu/lb)	Minimum Required Detection Limit (mg/kg)
Total Nitrogen as N	NA	4900	.....
Total Halogens as Cl	NA	540	.....
Total Organic Halogens as Cl	NA	([a])	.....
Polychlorinated biphenyls, total [Aroclors, total]	1336-36-3	ND	1.4
Cyanide, total	57-12-5	ND	1
Metals:			
Antimony, total	7440-36-0	12	.....
Arsenic, total	7440-38-2	0.23	.....
Barium, total	7440-39-3	23	.....
Beryllium, total	7440-41-7	1.2	.....
Cadmium, total	7440-43-9	1.2	.....
Chromium, total	7440-47-3	2.3	.....
Cobalt	7440-48-4	4.6	.....
Lead, total	7439-92-1	31	.....
Manganese	7439-96-5	1.2	.....
Mercury, total	7439-97-6	0.25	.....
Nickel, total	7440-02-0	58	.....
Selenium, total	7782-49-2	0.23	.....
Silver, total	7440-22-4	2.3	.....
Thallium, total	7440-28-0	23	.....
Hydrocarbons:			
Benzo[a]anthracene	56-55-3	2400	.....
Benzene	71-43-2	4100	.....
Benzo[b]fluoranthene	205-99-2	2400	.....
Benzo[k]fluoranthene	207-08-9	2400	.....
Benzo[a]pyrene	50-32-8	2400	.....
Chrysene	218-01-9	2400	.....
Dibenzo[a,h]anthracene	52-70-3	2400	.....
7,12-Dimethylbenz[a]anthracene	57-97-6	2400	.....
Fluoranthene	206-44-0	2400	.....
Indeno(1,2,3-cd)pyrene	193-39-5	2400	.....
3-Methylcholanthrene	56-49-5	2400	.....
Naphthalene	91-20-3	3200	.....
Toluene	108-88-3	36000	.....
Oxygenates:			
Acetophenone	98-86-1	2400	.....
Acrolein	107-02-8	39	.....
Allyl alcohol	107-18-6	30	.....
Bis(2-ethylhexyl)phthalate [Di-2-ethylhexyl phthalate]	117-81-7	2400	.....
Butyl benzyl phthalate	85-68-7	2400	.....
o-Cresol [2-Methyl phenol]	95-48-7	2400	.....
m-Cresol [3-Methyl phenol]	108-39-4	2400	.....
p-Cresol [4-Methyl phenol]	106-44-5	2400	.....
Di-n-butyl phthalate	84-74-2	2400	.....

Diethyl phthalate	84-66-2	2400	.....
2,4-Dimethylphenol	105-67-9	2400	.....
Dimethyl phthalate	131-11-3	2400	.....
Di-n-octyl phthalate	117-84-0	2400	.....
Endothall	145-73-3	100	.....
Ethyl methacrylate	97-63-2	39	.....
2-Ethoxyethanol [Ethylene glycol monoethyl ether]	110-80-5	100	.....
Isobutyl alcohol	78-83-1	39	.....
Isosafrole	120-58-1	2400	.....
Methyl ethyl ketone [2-Butanone]	78-93-3	39	.....
Methyl methacrylate	80-62-6	39	.....
1,4-Naphthoquinone	130-15-4	2400	.....
Phenol	108-95-2	2400	.....
Propargyl alcohol [2-Propyn-1-ol]	107-19-7	30	.....
Safrole	94-59-7	2400	.....
Sulfonated Organics:			
Carbon disulfide	75-15-0	ND	39
Disulfoton	298-04-4	ND	2400
Ethyl methanesulfonate	62-50-0	ND	2400
Methyl methanesulfonate	66-27-3	ND	2400
Phorate	298-02-2	ND	2400
1,3-Propane sultone	1120-71-4	ND	100
Tetraethyldithiopyrophosphate [Sulfotepp]	3689-24-5	ND	2400
Thiophenol [Benzenethiol]	108-98-5	ND	30
O,O,O-Triethyl phosphorothioate	126-68-1	ND	2400
Nitrogenated Organics:			
Acetonitrile [Methyl cyanide]	75-05-8	ND	39
2-Acetylaminofluorene [2-AAF]	53-96-3	ND	2400
Acrylonitrile	107-13-1	ND	39
4-Aminobiphenyl	92-67-1	ND	2400
4-Aminopyridine	504-24-5	ND	100
Aniline	62-53-3	ND	2400
Benzidine	92-87-5	ND	2400
Dibenz[a,j]acridine	224-42-0	ND	2400
O,O-Diethyl O-pyrazinyl phosphorothioate [Thionazin]	297-97-2	ND	2400
Dimethoate	60-51-5	ND	2400
p-(Dimethylamino) azobenzene [4-Dime thylaminoazobenzene]	60-11-7	ND	2400
3,3[prime]-Dimethylbenzidine	119-93-7	ND	2400
α,α-Dimethylphenethylamine	122-09-8	ND	2400
3,3[prime]-Dimethoxybenzidine	119-90-4	ND	100
1,3-Dinitrobenzene [m-Dinitrobenzene]	99-65-0	ND	2400
4,6-Dinitro-o-cresol	534-52-1	ND	2400
2,4-Dinitrophenol	51-28-5	ND	2400
2,4-Dinitrotoluene	121-14-2	ND	2400
2,6-Dinitrotoluene	606-20-2	ND	2400
Dinoseb [2-sec-Butyl-4,6-dinitrophenol]	88-85-7	ND	2400
Diphenylamine	122-39-4	ND	2400
Ethyl carbamate [Urethane]	51-79-6	ND	100
Ethylenethiourea (2-Imidazolidinethione)	96-45-7	ND	110

Famphur	52-85-7	ND	2400
Methacrylonitrile	126-98-7	ND	39
Methapyrilene	91-80-5	ND	2400
Methomyl	16752-77-5	ND	57
2-Methyllactonitrile, [Acetone cyanohydrin]	75-86-5	ND	100
Methyl parathion	298-00-0	ND	2400
MNNG (N-Metyl-N-nitroso-N[prime]-nitroguanidine)	70-25-7	ND	110
1-Naphthylamine, [α-Naphthylamine]	134-32-7	ND	2400
2-Naphthylamine, [β-Naphthylamine]	91-59-8	ND	2400
Nicotine	54-11-5	ND	100
4-Nitroaniline, [p-Nitroaniline]	100-01-6	ND	2400
Nitrobenzene	98-96-3	ND	2400
p-Nitrophenol, [p-Nitrophenol]	100-02-7	ND	2400
5-Nitro-o-toluidine	99-55-8	ND	2400
N-Nitrosodi-n-butylamine	924-16-3	ND	2400
N-Nitrosodiethylamine	55-18-5	ND	2400
N-Nitrosodiphenylamine, [Diphenylnitrosamine]	86-30-6	ND	2400
N-Nitroso-N-methylethylamine	10595-95-6	ND	2400
N-Nitrosomorpholine	59-89-2	ND	2400
N-Nitrosopiperidine	100-75-4	ND	2400
N-Nitrosopyrrolidine	930-55-2	ND	2400
2-Nitropropane	79-46-9	ND	2400
Parathion	56-38-2	ND	2400
Phenacetin	62-44-2	ND	2400
1,4-Phenylene diamine, [p-Phenylenediamine]	106-50-3	ND	2400
N-Phenylthiourea	103-85-5	ND	57
2-Picoline [alpha-Picoline]	109-06-8	ND	2400
Propylthioracil, [6-Propyl-2-thiouracil]	51-52-5	ND	100
Pyridine	110-86-1	ND	2400
Strychnine	57-24-9	ND	100
Thioacetamide	62-55-5	ND	57
Thiofanox	39196-18-4	ND	100
Thiourea	62-56-6	ND	57
Toluene-2,4-diamine [2,4-Diaminotoluene]	95-80-7	ND	57
Toluene-2,6-diamine [2,6-Diaminotoluene]	823-40-5	ND	57
o-Toluidine	95-53-4	ND	2400
p-Toluidine	106-49-0	ND	100
1,3,5-Trinitrobenzene, [sym-Trinitobenzene]	99-35-4	ND	2400
Halogenated Organics:			
Allyl chloride	107-05-1	ND	39
Aramite	140-57-8	ND	2400
Benzal chloride [Dichloromethyl benzene]	98-87-3	ND	100
Benzyl chloride	100-44-77	ND	100
bis(2-Chloroethyl)ether [Dichoroethyl ether]	111-44-4	ND	2400
Bromoform [Tribromomethane]	75-25-2	ND	39
Bromomethane [Methyl bromide]	74-83-9	ND	39
4-Bromophenyl phenyl ether [p-Bromo diphenyl ether]	101-55-3	ND	2400
Carbon tetrachloride	56-23-5	ND	39
Chlordane	57-74-9	ND	14

p-Chloroaniline	106-47-8	ND	2400
Chlorobenzene	108-90-7	ND	39
Chlorobenzilate	510-15-6	ND	2400
p-Chloro-m-cresol	59-50-7	ND	2400
2-Chloroethyl vinyl ether	110-75-8	ND	39
Chloroform	67-66-3	ND	39
Chloromethane [Methyl chloride]	74-87-3	ND	39
2-Chloronaphthalene [beta-Chloronaphthalene]	91-58-7	ND	2400
2-Chlorophenol [o-Chlorophenol]	95-57-8	ND	2400
Chloroprene [2-Chloro-1,3-butadiene]	1126-99-8	ND	39
2,4-D [2,4-Dichlorophenoxyacetic acid]	94-75-7	ND	7
Diallate	2303-16-4	ND	3400
1,2-Dibromo-3-chloropropane	96-12-8	ND	39
1,2-Dichlorobenzene [o-Dichlorobenzene]	95-50-1	ND	2400
1,3-Dichlorobenzene [m-Dichlorobenzene]	541-73-1	ND	2400
1,4-Dichlorobenzene [p-Dichlorobenzene]	106-46-7	ND	2400
3,3[prime]-Dichlorobenzidine	91-94-1	ND	2400
Dichlorodifluoromethane [CFC-12]	75-71-8	ND	39
1,2-Dichloroethane [Ethylene dichloride]	107-06-2	ND	39
1,1-Dichloroethylene [Vinylidene chloride]	75-35-4	ND	39
Dichloromethoxy ethane [Bis(2-chloroethoxy)methane]	111-91-1	ND	2400
2,4-Dichlorophenol	120-83-2	ND	2400
2,6-Dichlorophenol	87-65-0	ND	2400
1,2-Dichloropropane [Propylene dichloride]	78-87-5	ND	39
cis-1,3-Dichloropropylene	10061-01-5	ND	39
trans-1,3-Dichloropropylene	10061-02-6	ND	39
1,3-Dichloro-2-propanol	96-23-1	ND	30
Endosulfan I	959-98-8	ND	1.4
Endosulfan II	33213-65-9	ND	1.4
Endrin	72-20-8	ND	1.4
Endrin aldehyde	7421-93-4	ND	1.4
Endrin Ketone	53494-70-5	ND	1.4
Epichlorohydrin [1-Chloro-2,3-epoxy propane]	106-89-8	ND	30
Ethylidene dichloride [1,1-Dichloroethane]	75-34-3	ND	39
2-Fluoroacetamide	640-19-7	ND	100
Heptachlor	76-44-8	ND	1.4
Heptachlor epoxide	1024-57-3	ND	2.8
Hexachlorobenzene	118-74-1	ND	2400
Hexachloro-1,3-butadiene [Hexachlorobutadiene].	87-68-3	ND	2400
Hexachlorocyclopentadiene	77-47-4	ND	2400
Hexachloroethane	67-72-1	ND	2400
Hexachlorophene	70-30-4	ND	59000
Hexachloropropene [Hexachloropropylene]	1888-71-7	ND	2400
Isodrin	465-73-6	ND	2400
Kepone [Chlordecone]	143-50-0	ND	4700
Lindane [gamma-BHC] [gamma-Hexachlorocyclohexane]	58-89-9	ND	1.4
Methylene chloride [Dichloromethane]	75-09-2	ND	39
4,4[prime]-Methylene-bis(2-chloroaniline)	101-14-4	ND	100
Methyl iodide [Iodomethane]	74-88-4	ND	39

Pentachlorobenzene	608-93-5	ND	2400
Pentachloroethane	76-01-7	ND	39
Pentachloronitrobenzene [PCNB] [Quintobenzene] [Quintozene].	82-68-8	ND	2400
Pentachlorophenol	87-88-5	ND	2400
Pronamide	23950-58-5	ND	2400
Silvex [2,4,5-Trichlorophenoxypropionic acid]	93-72-1	ND	7
2,3,7,8-Tetrachlorodibenzo-p-dioxin [2,3,7,8-TCDD]	1746-01-6	ND	30
1,2,4,5-Tetrachlorobenzene	95-94-3	ND	2400
1,1,2,2-Tetrachloroethane	79-35-4	ND	39
Tetrachloroethylene [Perchloroethylene]	127-18-4	ND	39
2,3,4,6-Tetrachlorophenol	58-90-2	ND	2400
1,2,4-Trichlorobenzene	120-82-1	ND	2400
1,1,1-Trichloroethane [Methyl chloroform]	71-56-6	ND	39
1,1,2-Trichloroethane [Vinyl trichloride]	79-00-5	ND	39
Trichloroethylene	79-01-6	ND	39
Trichlorofluoromethane [Trichlormonofluoromethane]	75-69-4	ND	39
2,4,5-Trichlorophenol	95-95-4	ND	2400
2,4,6-Trichlorophenol	88-06-2	ND	2400
1,2,3-Trichloropropane	96-18-4	ND	39
Vinyl Chloride	75-01-4	ND	39

Notes:

NA--Not Applicable.

ND--Nondetect.

([a]) 25 or individual halogenated organics listed below.

[FR Doc. E9–29063 Filed 12–7–09; 8:45 am]
BILLING CODE 6560–50–C

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 300

[EPA–HQ–SFUND–1990–0011; FRL–9089–9]

National Oil and Hazardous Substance Pollution Contingency Plan National Priorities List

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of intent to delete the Kerr-McGee Reed-Keppler Park Superfund Site from the National Priorities List.

SUMMARY: EPA, Region 5 is issuing a Notice of Intent to Delete the Kerr-McGee Reed-Keppler Park Superfund Site (Site) located in West Chicago, Illinois, from the National Priorities List (NPL) and requests public comments on this proposed action. The NPL, promulgated pursuant to Section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, as amended, is an appendix of the National Oil and Hazardous Substances Pollution Contingency Plan (NCP). EPA and the State of Illinois, through the Illinois Environmental Protection Agency (IEPA), have determined that all appropriate response actions under CERCLA have been completed. However, this deletion does not preclude future actions under Superfund.

DATES: Comments must be received by January 7, 2010.

ADDRESSES: Submit your comments, identified by Docket ID no. EPA–HQ–SFUND–1990–0011, by one of the following methods:

- *http://www.regulations.gov:* Follow on-line instructions for submitting comments.
- *E-mail:* Timothy Fischer, Remedial Project Manager, at *fischer.timothy@epa.gov* or Janet Pope, Community Involvement Coordinator, at *pope.janet@epa.gov.*
- *Fax:* Gladys Beard at (312) 697–2077.
- *Mail:* Timothy Fischer, Remedial Project Manager, U.S. Environmental Protection Agency (SR–7J), 77 W. Jackson Blvd., Chicago, IL 60604, (312) 886–5787, or Janet Pope, Community Involvement Coordinator, U.S. Environmental Protection Agency (SI–7J), 77 W. Jackson Blvd., Chicago, IL 60604, (312) 353–0628 or 1–800–621–8431.
- *Hand delivery:* Janet Pope, Community Involvement Coordinator, U.S. Environmental Protection Agency (SI–7J), 77 W. Jackson Blvd., Chicago, IL 60604. Such deliveries are only accepted during the docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information. The normal business hours are Monday through Friday, 8:30 am to 4:30 pm.

Instructions: Direct your comments to Docket ID no. EPA–HQ–SFUND–1990–0011. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or E-mail. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov,* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA

recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket

All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information may not be publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in the hard copy. Publicly available docket materials are available either electronically at *http://www.regulations.gov* or in hard copy at: U.S. Environmental Protection Agency—Region 5, 77 W. Jackson Blvd., Chicago, IL 60604, Hours: Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding Federal holidays. West Chicago Public Library, 118 W. Washington St., West Chicago, IL 60185, (630) 231–1552, Hours: Monday through Thursday, 9 a.m. to 9 p.m.; Friday and Saturday, 9 a.m. to 5 p.m.; and Sundays until May, 1 p.m. to 5 p.m.

FOR FURTHER INFORMATION CONTACT: Timothy Fischer, Remedial Project Manager, U.S. Environmental Protection Agency (SR–6J), 77 W. Jackson Blvd., Chicago, IL 60604, (312) 886–4737, *fischer.timothy@epa.gov.*

SUPPLEMENTARY INFORMATION:

In the ''*Rules and Regulations*'' section of today's **Federal Register,** we are publishing a direct final Notice of Deletion of the Kerr-McGee Reed Keppler Park Superfund Site without prior Notice of Intent to Delete because we view this as a noncontroversial revision and anticipate no adverse comment. We have explained our reasons for this deletion in the preamble to the direct final Notice of Deletion, and those reasons are incorporated herein. If we receive no adverse comment(s) on this deletion action, we will not take further action on this Notice of Intent to Delete. If we receive adverse comment(s), we will withdraw the direct final Notice of Deletion, and it will not take effect. We will, as appropriate, address all public comments in a subsequent final Notice of Deletion based on this Notice of Intent to Delete. We will not institute a second comment period on this Notice of Intent to Delete. Any parties interested in commenting must do so at this time.

For additional information, see the direct final Notice of Deletion which is located in the *Rules and Regulations* section of this **Federal Register**.

List of Subjects in 40 CFR Part 300

Environmental protection, Air pollution control, Chemicals, Hazardous waste, Hazardous substances, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Superfund, Water pollution control, Water supply.

Authority: 33 U.S.C. 1321(c)(2); 42 U.S.C. 9601–9657; E.O. 12777, 56 FR 54757, 3 CFR, 1991 Comp., p. 351; E.O. 12580, 52 FR 2923; 3 CFR, 1987 Comp., p. 193.

Dated: November 20, 2009.

Bharat Mathur,

Acting Regional Administrator, Region 5.

[FR Doc. E9–29090 Filed 12–7–09; 8:45 am]

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Notices

Federal Register
Vol. 74, No. 234
Tuesday, December 8, 2009

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

December 3, 2009.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8681.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

National Agricultural Statistics Service

Title: Cold Storage.

OMB Control Number: 0535–0001.

Summary of Collection: The primary objective of the National Agricultural Statistics Service (NASS) is to prepare and issue State and national estimates of crop and livestock production, value and disposition. The monthly Cold Storage Survey provides information on national supplies of food in refrigerated storage facilities. A biennial survey of refrigerated warehouses is also conducted to provide a benchmark of the capacity available for refrigerated storage of the nation's food supply. The data will be collected under the authority of 7 U.S.C. 2204(a). This statue specifies ''The Secretary of Agriculture shall procure and preserve all information concerning agriculture which he can obtain * * * by the collection of statistics * * * and shall distribute them among agriculturists.''

Need and Use of the Information: USDA agencies such as the World Agricultural Outlook Board, Economic Research Service, and Agricultural Marketing Service use information from the Cold Storage report in setting and administering government commodity programs and in supply and demand analysis. Included in the report are stocks of pork bellies, frozen orange juice concentrate, butter, and cheese which are traded on the Chicago Board of Trade. The timing and frequency of the surveys have evolved to meet the needs of producers, facilities, agribusinesses, and government agencies.

Description of Respondents: Business or other for-profit.

Number of Respondents: 3,175.

Frequency of Responses: Reporting: Monthly; biennially.

Total Burden Hours: 7,949.

National Agricultural Statistics Service

Title: Agricultural Prices.

OMB Control Number: 0535–0003.

Summary of Collection: Estimates of prices received by farmers and prices paid for production goods and services are needed by the U.S. Department of Agriculture, National Agriculture Statistics Service (NASS) for the following purposes: (a) To compute Parity Prices in accordance with requirements of the Agricultural Adjustment Act of 1938 as amended (Title III, Subtitle A, Section 301a, (b) to estimate value of production, inventory values, and cash receipts from farming, (c) to determine the level for farmer owned reserves, (d) to provide guidelines for Risk Management Agency price selection options, (e) to determine Federal disaster prices to be paid, and (f) to determine the grazing fee on Federal lands. General authority for these data collection activities is granted under U.S. Code Title 7, Section 2204.

Need and Use of the Information: The NASS price program computes annual U.S. weighted average prices received by farmers for wheat, barley, corn, oats, grain sorghum, rice, cotton, pulse crops, peanuts, and oilseeds based on monthly marketing. Prices estimates are used by many Government agencies as a general measure of commodity price changes, economic analysis relating to farm income and alternative marketing policis, and for disaster and insurance payments.

Description of Respondents: Farms; business or other for-profit.

Number of Respondents: 114,085.

Frequency of Responses: Reporting: On occasion; monthly; annually; biennially.

Total Burden Hours: 37,213.

Charlene Parker,

Departmental Information Collection Clearance Officer.

[FR Doc. E9–29257 Filed 12–7–09; 8:45 am]

BILLING CODE 3410–20–P

DEPARTMENT OF AGRICULTURE

Forest Service

Draft Tropic to Hatch 138 kV Transmission Line Project Environmental Impact Statement and Draft Grand Staircase-Escalante National Monument Management Plan Amendment

AGENCY: Forest Service, USDA; Bureau of Land Management, USDI and National Park Service, USDI.

ACTION: Notice of availability.

SUMMARY: In accordance with the National Environmental Policy Act of 1969, as amended, and the Federal Land Policy and Management Act of 1976, as amended, the Forest Service (FS), with the Bureau of Land Management (BLM)

and National Park Service (NPS) as cooperating agencies, has prepared a Draft Environmental Impact Statement (DEIS) for the Tropic to Hatch 138 kV Transmission Line Project and a Draft Resource Management Plan Amendment (DRMPA) for the Grand Staircase-Escalante National Monument and by this notice is announcing the opening of the comment period.

DATES: To ensure that comments will be considered, the FS must receive written comments on the DRMPA and DEIS within 90 days following the date the Environmental Protection Agency publishes this Notice of Availability in the **Federal Register.** The FS will announce future meetings or hearings and any other public involvement activities at least 15 days in advance through public notices, media releases, and/or mailings.

ADDRESSES: You may submit comments related to the Tropic-to-Hatch Transmission Line by any of the following methods:

- *Web site: http://www.fs.fed.us/r4/dixie/projects/tropic2hatch/index.shtml.*
- *E-mail: tropic_to_hatch_transmission_line_EIS-comments@fs.fed.us* (e-mail comments must be in MS Word [*.doc] or rich text format [*.rtf]).
- *Fax:* (435) 865–3791.
- *Mail:* Ms. Susan Baughman, Dixie National Forest, USDA Forest Service, Tropic to Hatch 138 kV Transmission Line Project, 1789 N. Wedgewood Lane, Cedar City, Utah 84721.

Copies of the Draft Garkane Energy Tropic to Hatch 138 kV Transmission Line and Draft Grand Staircase-Escalante National Monument Management Plan Amendment are available at the above address or at the following BLM offices: Grand Staircase-Escalante National Monument Headquarters, 190 E. Center Street, Kanab, UT; Kanab Field Office, 318 N 100 E, Kanab, UT; Utah State Office, 440 W 200 S, Salt Lake City, UT.

FOR FURTHER INFORMATION CONTACT: Ms. Susan Baughman, Dixie National Forest, USDA Forest Service, Tropic to Hatch 138 kV Transmission Line Project EIS Project Leader, 1789 N. Wedgewood Lane, Cedar City, Utah 84720 or; Drew Parkin, Grand Staircase-Escalante National Monument Project Coordinator, 190 E Center, Kanab, Utah 84741/phone (435) 826–5629.

SUPPLEMENTARY INFORMATION: The proposed 138 kV transmission line would originate at a proposed East Valley Substation, located near Tropic, Utah and terminate at the existing Hatch Substation near Hatch, Utah, along U.S. Route 89. There are four alternatives being considered, including interconnect options and identification of the Agency Preferred Alternative.

A plan amendment for the Grand Staircase/Escalante Monument Management Plan would be needed to implement Alternatives A or C because the proposal occurs in an area identified as a Primitive Management Zone and Visual Resource Management (VRM) Class II zone as described in the MMP. While the entire project involves lands administered by BLM, both the Kanab Field Office and GSENM, Dixie National Forest, Bryce Canyon National Park, and State and private lands, the resource management plan amendment area involves only a corridor on the Monument.

Issues that have been identified to date and are addressed in the DEIS include potential impacts to: Paleontological resources; soil resources; water resources; vegetation resources; wildlife resources; threatened, endangered and sensitive species; land uses; timber and rangeland resources; special designations (including Wilderness Study Areas, Non-WSA lands with wilderness character), recreation resources, visual resources, cultural resources, and socioeconomics.

Alternative A would extend 30.41 miles and cross 17.35 miles of United States Forest Service (USFS), 3.31 miles of Kanab Field Office (KFO), 3.68 miles of Grand Staircase Escalante National Monument (GSENM), 4.23 miles of State, and 1.84 miles of private lands. Approximately 16.23 miles of an existing 69 kV line would be removed. This alternative would amend the GSENM Management Plan (2000) by designating a 100-foot wide Passage Zone corridor through an area currently designated as Primitive Zone in the Management Plan, and to change the existing VRM Class designation from Class II to Class III within this corridor.

Alternative B would extend 29.11 miles and cross 5.58 miles of USFS, 8.29 miles of KFO, 2.81 miles of National Park Service (NPS), 3.63 miles of State, and 8.80 miles of private lands. Approximately 21.57 miles of an existing 69 kV line would be removed. This alternative requires the building of an additional substation in Bryce Valley.

Alternative C would extend 29.78 miles and cross 13.58 miles of USFS, 3.43 miles of KFO, 3.68 miles of GSENM, 2.06 miles of State, and 7.03 miles of private lands. Approximately 16.23 miles of an existing 69 kV line would be removed. This alternative would also amend the GSENM Management Plan (2000) by designating a 300-foot wide Passage Zone corridor through an area currently designated as Primitive Zone in the Management Plan, and to change the existing VRM Class designation from Class II to Class III within this corridor. The 300-foot Passage Zone corridor would encompass an existing Rocky Mountain Power/PacifiCorp 230 kV transmission line, and would allow for future upgrades if necessary.

Alternative D, the No Action Alternative is considered to be the continued operation of the existing 69 kV line and future circumstances that would occur without federal approval of Garkane Energy's proposal to construct and operate a 138 kV electric transmission line from Tropic to Hatch, Utah. Under the ''no action'' alternative, any or all of the federal agencies would decline to grant Garkane a right-of-way within the agency's respective jurisdiction.

Interconnect Route Options: The purpose of the interconnect route options is to provide flexibility to decision makers when selecting and approving a final alternative. The north-south interconnect option extends 1.84 miles across USFS and would connect a segment of Alternative A to a segment of Alternative C. The east-west interconnect option extends 3.70 miles across USFS and would connect a segment of Alternative C to a segment of Alternative A.

The Agency Preferred Alternative is Alternative C, but it incorporates components from the east-west interconnect option and Alternative A. The total length of the preferred route would be 29.41 miles. Approximately 16.23 miles of the existing 69 kV transmission line infrastructure would be removed. The Agency Preferred Alternative would also amend the GSENM Management Plan (2000) by designating a 300-foot wide Passage Zone corridor through an area currently designated as Primitive Zone in the Management Plan, and to change the existing VRM Class designation from Class II to Class III within this corridor.

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

(Authority: 42 U.S.C. 4321–4347, 40 CFR 1500–1508, and 36 CFR 220)

Dated: December 2, 2009.

Robert G. MacWhorter,

Forest Supervisor-Dixie National Forest.

[FR Doc. E9–29227 Filed 12–7–09; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Agricultural Research Service

Notice of Intent To Grant Exclusive License

AGENCY: Agricultural Research Service, USDA.

ACTION: Notice of intent.

SUMMARY: Notice is hereby given that the U.S. Department of Agriculture, Agricultural Research Service, intends to grant to BARRON & BROTHERS INTERNATIONAL of CORNELIA, GEORGIA, an exclusive license to U.S. Patent Application Serial No. 12/494,490, ''SYSTEM FOR DELIVERING POULTRY LITTER BELOW SOIL SURFACE'', filed on JUNE 30, 2009.

DATES: Comments must be received on or before January 7, 2010.

ADDRESSES: Send comments to: USDA, ARS, Office of Technology Transfer, 5601 Sunnyside Avenue, Rm. 4–1174, Beltsville, Maryland 20705–5131.

FOR FURTHER INFORMATION CONTACT: June Blalock of the Office of Technology Transfer at the Beltsville address given above; telephone: 301–504–5989.

SUPPLEMENTARY INFORMATION: The Federal Government's patent rights in this invention are assigned to the United States of America, as represented by the Secretary of Agriculture. It is in the public interest to so license this invention as BARRON & BROTHERS INTERNATIONAL of CORNELIA, GEORGIA, has submitted a complete and sufficient application for a license. The prospective exclusive license will be royalty-bearing and will comply with the terms and conditions of 35 U.S.C. 209 and 37 CFR 404.7. The prospective exclusive license may be granted unless, within thirty (30) days from the date of this published Notice, the Agricultural Research Service receives written evidence and argument which establishes that the grant of the license would not be consistent with the requirements of 35 U.S.C. 209 and 37 CFR 404.7.

Richard J. Brenner,

Assistant Administrator.

[FR Doc. E9–29247 Filed 12–7–09; 8:45 am]

BILLING CODE 3410–03–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; National Ocean Recreational Expenditure Survey

AGENCY: National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

DATES: Written comments must be submitted on or before February 8, 2010.

ADDRESSES: Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 7845, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Rosemary Kosaka, (831) 420–3988 or *Rosemary.Kosaka@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

The National Marine Fisheries Service (NMFS) plans to collect data to estimate expenditures on recreational activities in the U.S. that interact with marine resources falling within the scope of NMFS' public trust responsibilities. These activities may include but are not limited to: Wildlife watching (for example, whales or dolphins) from a boat or from shore; kayaking or canoeing in fish habitat areas such as estuaries and sloughs; and snorkeling or scuba diving on fish aggregating devices such as ship wrecks. The survey will help enhance NMFS' understanding of the economic implications of its public trust responsibilities as they relate to non-fishing recreational activities. The data collected may also provide information useful for the purposes of marine spatial planning. Measures of economic performance that may be supported by this data collection include the following: (1) Contribution to net national benefit; and (2) contribution to regional economic impacts (income and employment).

II. Method of Collection

A survey screener will be used to identify possible respondents who will then be asked to complete a voluntary Web-based survey questionnaire on a monthly basis for three or more months.

III. Data

OMB Control Number: None.

Form Number: None.

Type of Review: Regular submission.

Affected Public: Individuals or households.

Estimated Number of Respondents: 20,000.

Estimated Time per Response: 15 minutes survey screener; 15–30 minutes monthly survey.

Estimated Total Annual Burden Hours: 20,000–35,000 hours.

Estimated Total Annual Cost to Public: $0.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: December 2, 2009.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. E9–29134 Filed 12–7–09; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

International Trade Administration

Honolulu Police Department - SIS, et al., Notice of Consolidated Decision on Applications for Duty–Free Entry of Electron Microscopes

This is a decision consolidated pursuant to Section 6(c) of the Educational, Scientific, and Cultural Materials Importation Act of 1966 (Pub. L. 89–651, as amended by Pub. L. 106–36; 80

Stat. 897; 15 CFR part 301). Related records can be viewed between 8:30 A.M. and 5:00 P.M. in Room 3705, U.S. Department of Commerce, 14th and Constitution Avenue., NW, Washington, D.C.

Docket Number: 09–058. Applicant: Honolulu Police Department–SIS, Honolulu, HI 96813. Instrument: Electron Microscope. Manufacturer: FEI Company, Czech Republic. Intended Use: See notice at 74 FR 58001, November 10, 2009.

Docket Number: 09–060. Applicant: University of California at San Francisco, San Francisco, CA 94103. Instrument: Electron Microscope. Manufacturer: JEOL Ltd., Japan. Intended Use: See notice at 74 FR 58001, November 10, 2009.

Docket Number: 09–061. Applicant: Argonne National Laboratory, Lemont, IL 60439. Instrument: Electron Microscope. Manufacturer: JEOL, Ltd., Japan. Intended Use: See notice at 74 FR 58001, November 10, 2009.

Docket Number: 09–062. Applicant: Department of Homeland Security, Fredrick, MD 21702. Instrument: Electron Microscope. Manufacturer: FEI Company, Czech Republic. Intended Use: See notice at 74 FR 58001, November 10, 2009.

Comments: None received. Decision: Approved. No instrument of equivalent scientific value to the foreign instrument, for such purposes as these instruments are intended to be used, was being manufactured in the United States at the time the instruments were ordered. Reasons: Each foreign instrument is an electron microscope and is intended for research or scientific educational uses requiring an electron microscope. We know of no electron microscope, or any other instrument suited to these purposes, which was being manufactured in the United States at the time of order of each instrument.

Dated: December 1, 2009.

Christopher Cassel,

Director, Subsidies Enforcement Office, Import Administration.

[FR Doc. E9–29235 Filed 12–7–09; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

Fermi Research Alliance LLC, et al., Notice of Decision on Applications for Duty–Free Entry of Scientific Instruments

This is a decision pursuant to Section 6(c) of the Educational, Scientific, and Cultural Materials Importation Act of 1966 (Pub. L. 89–651, as amended by Pub. .106–36; 80 Stat. 897; 15 CFR part 301). Related records can be viewed between 8:30 A.M. and 5:00 P.M. in Room 3705, U.S. Department of Commerce, 14th and Constitution Ave, NW, Washington, D.C.

Comments: None received. Decision: Approved. We know of no instruments of equivalent scientific value to the foreign instruments described below, for such purposes as this is intended to be used, that was being manufactured in the United States at the time of its order.

Docket Number: 09–059. Applicant: Fermi Research Alliance LLC–Fermi National Accelerator Laboratory, Batavia, IL 60510. Instrument: Wavelength Shifting Fiber. Manufacturer: Kuraray Co., Ltd., Japan. Intended Use: See notice at 74 FR 58002, November 10, 2009.

Reasons: The wavelength shifting fibers must be .7mm in diameter and 32 meters in length. Further, the light generated in the fiber must not suffer unacceptable attenuation in traveling down 16–20 m of the WLS fiber. As such, a pertinent characteristic of this instrument is that it have an attenuation length of >20m. We know of no instrument suited to these purposes, which was being manufactured in the United States at the time of order of this instrument.

Docket Number: 09–063. Applicant: Argonne National Laboratory, Lemont, IL 60439. Instrument: CEOS Spherical Aberration Corrector. Manufacturer: CEOS Corrected Electron Optical Systems, GmbH, Germany. Intended Use: See notice at 74 FR 58002, November 10, 2009. Reasons: A pertinent characteristic of this instrument is that it must be capable of compensating completing the spherical aberration of the low field objective lens on the 2100F TEM to which it will be attached. The spherical aberration coefficient of this lens is 200 mm. In addition, the CEOS aberration corrector can compensate this value of spherical aberration while only increasing the chromatic aberration by approximately 20%. We know of no instrument suited to these purposes, which was being manufactured in the United States at the time of order of this instrument.

Dated: December 2, 2009.

Christopher Cassel,

Director, Subsidies Enforcement Office, Import Administration.

[FR Doc. E9–29246 Filed 12–7–09; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–601]

Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China; Extension of Time Limit for the Final Results of the 2007–2008 Administrative Review of the Antidumping Duty Order

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

FOR FURTHER INFORMATION CONTACT: Frances Veith or Brendan Quinn, AD/CVD Operations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230, telephone: (202) 482–4295 or (202) 482–5848, respectively.

SUPPLEMENTARY INFORMATION:

Background

On July 30, 2008, the Department of Commerce (''Department'') initiated the administrative review of the antidumping duty order on tapered roller bearings and parts thereof, finished or unfinished (''TRBs''), from the People's Republic of China (''PRC'') for the period June 1, 2007, through May 31, 2008. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews, Request for Revocation in Part, and Deferral of Administrative Review*, 73 FR 44220 (July 30, 2008). On July 8, 2009, the Department published its preliminary results on TRBs from the PRC. *See Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, from the People's Republic of China: Preliminary Results of the 2007 2008 Administrative Review of the Antidumping Duty Order*, 74 FR 32539 (July 8, 2009). On October 15, 2009, the Department extended the deadline for the final results by 30 days. *See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China; Extension of Time Limit for the Final Results of the 2007–2008 Administrative Review of the Antidumping Duty Order*, 74 FR 52948 (October 15, 2009). The final results of this administrative review are currently due no later than December 5, 2009.

Extension of Time Limit for Final Results

Section 751(a)(3)(A) of the Tariff Act of 1930, as amended (''the Act''), requires the Department to issue the final results in an administrative review within 120 days after the date on which

the preliminary results are published. However, if it is not practicable to complete the review within this time period, section 751(a)(3)(A) of the Act allows the Department to extend the time period to a maximum of 180 days.

We determine that it is not practicable to complete the final results of this review within the extended time limit because the Department requires additional time to analyze issues raised in parties' briefs and rebuttal briefs, which were also discussed in meetings with counsel for the parties, such as, surrogate values and third–country processing. Therefore, given the complexity of the issues in this case, we are extending the time limit for completion of the final results by an additional 21 days.

An extension of 21 days from the current deadline of December 5, 2009, would result in a new deadline of December 26, 2009. However, since December 26, 2009, falls on a Saturday, a non–business day, the final results will now be due no later than December 28, 2009, the next business day.

This notice is published pursuant to sections 751(a) and 777(i) of the Act.

Dated: December 1, 2009.

John M. Andersen,

Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. E9–29097 Filed 12–7–09; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

[C–533–825]

Polyethylene Terephthalate (PET) Film, Sheet, and Strip From India: Extension of Time Limit for Final Results of Countervailing Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

DATES: *Effective Date:* December 8, 2009.

FOR FURTHER INFORMATION CONTACT: Elfi Blum, AD/CVD Operations, Office 6, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington DC 20230; telephone: (202) 482–0197.

SUPPLEMENTARY INFORMATION:

Background

On August 7, 2009, the Department of Commerce (the Department) published the preliminary results of the administrative review of the countervailing duty order on polyethylene terephthalate (PET) film, sheet, and strip from India. *See Polyethylene Terephthalate Film, Sheet, and Strip from India: Preliminary Results of Countervailing Duty Administrative Review,* 74 FR 39631 (August 7, 2009). This administrative review covers the period January 1, 2007 through December 31, 2007. The current deadline for the final results of review is December 5, 2009. This review covers one producer/exporter of the subject merchandise to the United States, Jindal Poly Films Ltd. (Jindal), as well as the Government of India (GOI).

Extension of Time Limit for Final Results

Pursuant to section 751(a)(3)(A) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.213(h)(1), the Department shall issue final results in an administrative review of a countervailing duty order within 120 days after the date on which notice of the preliminary results was published in the **Federal Register**. However, if the Department determines that it is not practicable to complete the review within the aforementioned specified time limits, section 751(a)(3)(A) of the Act and 19 CFR 351.213(h)(2) allow the Department to extend the 120-day period to 180 days.

Pursuant to section 751(a)(3)(A) of the Act and 19 CFR 351.213(h)(2), we determine that it is not practicable to complete the results of this review within the original time limit. The Department needs additional time to analyze the supplemental questionnaire responses, which were recently submitted, and to determine whether any additional information is required. In accordance with section 751(a)(3)(A) of the Act, the Department has decided to extend the time limit for the final results from 120 days to 180 days; the final results will now be due no later than February 3, 2010.

This notice is issued and published in accordance with sections 751(a)(3)(A) and 777(i)(1) of the Act.

Dated: December 1, 2009.

John M. Andersen,

Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. E9–29244 Filed 12–7–09; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XS88

Schedules for Atlantic Shark Identification Workshops and Protected Species Safe Handling, Release, and Identification Workshops

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of public workshops.

SUMMARY: NMFS announces free Atlantic Shark Identification Workshops and Protected Species Safe Handling, Release, and Identification Workshops to be held in January, February, and March of 2010. Certain fishermen and shark dealers are required to attend a workshop to meet regulatory requirements and maintain valid permits. Specifically, the Atlantic Shark Identification Workshop is mandatory for all federally permitted Atlantic shark dealers. The Protected Species Safe Handling, Release, and Identification Workshop is mandatory for vessel owners and operators who use bottom longline, pelagic longline, or gillnet gear, and have also been issued shark or swordfish limited access permits. Additional free workshops will be held in 2010 and announced in the **Federal Register**.

DATES: The Atlantic Shark Identification Workshops will be held January 14, February 11, and March 24, 2010.

The Protected Species Safe Handling, Release, and Identification Workshops will be held January 13, January 27, February 17, February 24, March 10, and March 24, 2010.

See **SUPPLEMENTARY INFORMATION** for further details.

ADDRESSES: The Atlantic Shark Identification Workshops will be held in Manahawkin, NJ; Charleston, SC; and San Juan (Rio Piedras), Puerto Rico.

The Protected Species Safe Handling, Release, and Identification Workshops will be held in Clearwater, FL; Manahawkin, NJ; Key Largo, FL; Boston, MA; Galveston, TX; and Ocean City, MD.

See **SUPPLEMENTARY INFORMATION** for further details on workshop locations.

FOR FURTHER INFORMATION CONTACT: Richard A. Pearson by phone:(727) 824–5399, or by fax:(727) 824–5398.

SUPPLEMENTARY INFORMATION: The workshop schedules, registration information, and a list of frequently asked questions regarding these

workshops are posted on the internet at: *http://www.nmfs.noaa.gov/sfa/hms/workshops/*.

Atlantic Shark Identification Workshops

Since December 31, 2007, Atlantic shark dealers have been prohibited from receiving, purchasing, trading, or bartering for Atlantic sharks unless a valid Atlantic Shark Identification Workshop certificate is on the premises of each business listed under the shark dealer permit which first receives Atlantic sharks (71 FR 58057; October 2, 2006). Dealers who attend and successfully complete a workshop are issued a certificate for each place of business that is permitted to receive sharks. These certificate(s) are valid for three years. Approximately 40 free Atlantic Shark Identification Workshops have been conducted since January 2007.

Currently permitted dealers may send a proxy to an Atlantic Shark Identification Workshop. However, if a dealer opts to send a proxy, the dealer must designate a proxy for each place of business covered by the dealer's permit which first receives Atlantic sharks. Only one certificate will be issued to each proxy. A proxy must be a person who: is currently employed by a place of business covered by the dealer's permit; is a primary participant in the identification, weighing, and/or first receipt of fish as they are offloaded from a vessel; and fills out dealer reports. Atlantic shark dealers are prohibited from renewing a Federal shark dealer permit unless a valid Atlantic Shark Identification Workshop certificate for each business location which first receives Atlantic sharks has been submitted with the permit renewal application. Additionally, trucks or other conveyances which are extensions of a dealer's place of business must possess a copy of a valid dealer or proxy Atlantic Shark Identification Workshop certificate.

Workshop Dates, Times, and Locations

1. January 14, 2010, from 12 p.m. - 5 p.m., Ocean County Library - Stafford Branch, 129 N. Main Street, Manahawkin, NJ 08050.

2. February 11, 2010, from 12 p.m. - 5 p.m., Center for Coastal Environmental Health and Biomolecular Research, 219 Fort Johnson Road, Charleston, SC 29412.

3. March 24, 2010, from 10 a.m. - 3 p.m., Puerto Rico Department of Natural and Environmental Resources, Cruz A. Matos Building Auditorium, State Road 8838 km 6.3, Sector El Cinco, Rio Piedras, Puerto Rico 00936.

Registration

To register for a scheduled Atlantic Shark Identification Workshop, please contact Eric Sander by email at esander@peoplepc.com or by phone at (386) 852–8588.

Registration Materials

To ensure that workshop certificates are linked to the correct permits, participants will need to bring the following items to the workshop:

Atlantic shark dealer permit holders must bring proof that the attendee is an owner or agent of the business (such as articles of incorporation), a copy of the applicable permit, and proof of identification.

Atlantic shark dealer proxies must bring documentation from the permitted dealer acknowledging that the proxy is attending the workshop on behalf of the permitted Atlantic shark dealer for a specific business location, a copy of the appropriate valid permit, and proof of identification.

Workshop Objectives

The shark identification workshops are designed to reduce the number of unknown and improperly identified sharks reported in the dealer reporting form and increase the accuracy of species-specific dealer-reported information. Reducing the number of unknown and improperly identified sharks will improve quota monitoring and the data used in stock assessments. These workshops will train shark dealer permit holders or their proxies to properly identify Atlantic shark carcasses.

Protected Species Safe Handling, Release, and Identification Workshops

Since January 1, 2007, shark limited access and swordfish limited access permit holders who fish with longline or gillnet gear, have been required to submit a copy of their Protected Species Safe Handling, Release, and Identification Workshop certificate in order to renew either permit (71 FR 58057; October 2, 2006). These certificate(s) are valid for three years. As such, vessel owners who have not already attended a workshop and received a NMFS certificate, or vessel owners whose certificate(s) will expire before the next permit renewal, must attend a workshop to fish with, or renew, their swordfish and shark limited access permits. Additionally, new shark and swordfish limited access permit applicants who intend to fish with longline or gillnet gear must attend a Protected Species Safe Handling, Release, and Identification Workshop and submit a copy of their workshop certificate before either of the permits will be issued. Approximately 76 free Protected Species Safe Handling, Release, and Identification Workshops have been conducted since 2006.

In addition to certifying permit holders, all longline and gillnet vessel operators fishing on a vessel issued a limited access swordfish or limited access shark permit are required to attend a Protected Species Safe Handling, Release, and Identification Workshop and receive a certificate. The certificate(s) are valid for three years. Vessels that have been issued a limited access swordfish or limited access shark permit may not fish unless both the vessel owner and operator have valid workshop certificates onboard at all times.

Workshop Dates, Times, and Locations

1. January 13, 2010, from 9 a.m. - 5 p.m., Holiday Inn, 3535 Ulmerton Road, Clearwater, FL 33762.

2. January 27, 2010, from 9 a.m. - 5 p.m., Holiday Inn, 151 Route 72 East, Manahawkin, NJ 08050.

3. February 17, 2010, from 9 a.m. - 5 p.m., Holiday Inn, 99701 Overseas Highway, Key Largo, FL 33037.

4. February 24, 2010, from 9 a.m. - 5 p.m., Embassy Suites (at Logan airport), 207 Porter Street, Boston, MA 02128.

5. March 10, 2010, from 9 a.m. - 5 p.m., Holiday Inn Express, 8628 Seawall Boulevard, Galveston, TX 77554.

6. March 24, 2010, from 9 a.m. - 5 p.m., Princess Bayside Hotel, 4801 Coastal Highway, Ocean City, MD 21842.

Registration

To register for a scheduled Protected Species Safe Handling, Release, and Identification Workshop, please contact Angler Conservation Education at (386) 852–9137.

Registration Materials

To ensure that workshop certificates are linked to the correct permits, participants will need to bring the following items with them to the workshop:

Individual vessel owners must bring a copy of the appropriate swordfish and/or shark permit(s), a copy of the vessel registration or documentation, and proof of identification.

Representatives of a business owned or co-owned vessel must bring proof that the individual is an agent of the business (such as articles of incorporation), a copy of the applicable swordfish and/or shark permit(s), and proof of identification.

Vessel operators must bring proof of identification.

Workshop Objectives

The protected species safe handling, release, and identification workshops are designed to teach longline and gillnet fishermen the required techniques for the safe handling and release of entangled and/or hooked protected species, such as sea turtles, marine mammals, and smalltooth sawfish. The proper identification of protected species will also be taught at these workshops in an effort to improve reporting. Additionally, individuals attending these workshops will gain a better understanding of the requirements for participating in these fisheries. The overall goal of these workshops is to provide participants with the skills needed to reduce the mortality of protected species, which may prevent additional regulations on these fisheries in the future.

Grandfathered Permit Holders

Participants in the industry-sponsored workshops on safe handling and release of sea turtles that were held in Orlando, FL (April 8, 2005) and in New Orleans, LA (June 27, 2005) were issued a NOAA workshop certificate in December 2006 that was valid for three years. These workshop certificates have expired, or will be expiring in 2010. Vessel owners and operators whose certificates expire prior to the next permit renewal must attend a workshop, successfully complete the course, and obtain a new certificate in order to renew their limited access shark and limited access swordfish permits. Failure to provide a valid NOAA workshop certificate could result in a permit denial.

Dated: December 2, 2009.

Alan D. Risenhoover,

Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. E9–29258 Filed 12–7–09; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

United States Patent and Trademark Office

[Docket No. PTO–P–2009–0038]

Pilot Program for Green Technologies Including Greenhouse Gas Reduction

AGENCY: United States Patent and Trademark Office, Commerce.

ACTION: Notice.

SUMMARY: The United States Patent and Trademark Office (USPTO) is implementing a pilot program in which an applicant may have an application advanced out of turn (accorded special status) for examination, for applications pertaining to green technologies including greenhouse gas reduction (applications pertaining to environmental quality, energy conservation, development of renewable energy resources or greenhouse gas emission reduction). Currently, an application pertaining to environmental quality, or energy conservation, development of renewable energy resources or greenhouse gas reduction will not be advanced out of turn for examination unless it meets the requirements of the accelerated examination program. Under the Green Technology Pilot Program, applications pertaining to environmental quality, energy conservation, development of renewable energy, or greenhouse gas emission reduction, will be advanced out of turn for examination without meeting all of the current requirements of the accelerated examination program (*e.g.,* examination support document). The USPTO will accept only the first 3,000 petitions to make special in previously filed new applications, provided that the petitions meet the requirements set forth in this notice.

DATES: *Effective Date:* December 8, 2009.

Duration: The Green Technology Pilot Program will run for twelve months from its effective date. Therefore, petitions to make special under the Green Technology Pilot Program must be filed before December 8, 2010. The USPTO may extend the pilot program (with or without modifications) depending on the feedback from the participants and the effectiveness of the pilot program.

FOR FURTHER INFORMATION CONTACT: Pinchus M. Laufer and Joni Y. Chang, Senior Legal Advisors, Office of Patent Legal Administration, Office of the Associate Commissioner for Patent Examination Policy, by telephone at 571–272–7726 or 571–272–7720; by facsimile transmission to 571–273–7726, marked to the attention of Pinchus M. Laufer; or by mail addressed to: Mail Stop Comments Patents, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313–1450.

SUPPLEMENTARY INFORMATION: New patent applications are normally taken up for examination in the order of their United States filing date. *See* section 708 of the *Manual of Patent Examining Procedure* (8th ed. 2001) (Rev. 7, July 2008) (MPEP). The USPTO has a procedure under which an application will be advanced out of turn (accorded special status) for examination if the applicant files a petition to make special with the appropriate showing. *See* 37 CFR 1.102 and MPEP § 708.02. The USPTO revised its accelerated examination program in June of 2006, and required that all petitions to make special, except those based on applicant's health or age or the Patent Prosecution Highway (PPH) pilot program, comply with the requirements of the revised accelerated examination program. *See Changes to Practice for Petitions in Patent Applications To Make Special and for Accelerated Examination,* 71 FR 36323 (June 26, 2006), 1308 *Off. Gaz. Pat. Office* 106 (July 18, 2006) (notice); *see also* MPEP § 708.02(a). Applications that are accorded special status are generally placed on the examiner's special docket throughout its entire course of prosecution before the examiner, and have special status in any appeal to the Board of Patent Appeals and Interferences (BPAI) and also in the patent publication process. *See* MPEP § 708.01 and 1309.

The USPTO is implementing a pilot program to permit applications pertaining to ''green technologies'' (*i.e.,* applications pertaining to environmental quality, energy conservation, development of renewable energy resources, or greenhouse gas emission reduction) to be advanced out of turn without meeting all of the current requirements of the accelerated examination program set forth in item VIII of MPEP § 708.02(a) (*e.g.,* examination support document). The USPTO will accept the first 3,000 petitions to make special under the Green Technology Pilot Program in previously filed new applications, provided that the petitions meet all of the requirements set forth in this notice. Upon receipt of more than 3,000 petitions, the USPTO may reevaluate the workload and resources needed to extend the pilot program.

Applications that are accorded special status under the Green Technology Pilot Program will be placed on an examiner's special docket prior to the first Office action, and will have special status in any appeal to the BPAI and also in the patent publication process. Applications accorded special status under the Green Technology Pilot Program, however, will be placed on the examiner's amended docket, rather than the examiner's special docket, after the first Office action (which may be an Office action containing only a restriction requirement).

Applicant may participate in the Green Technology Pilot Program by filing a petition to make special that meets all of the requirements set forth in this notice in a previously filed application. No fee is required. The $130.00 fee for a petition under 37 CFR

1.102 (other than those enumerated in 37 CFR 1.102(c)) is hereby *sua sponte* waived for petitions to make special based upon the procedure specified in this notice. In addition, continuing applications will not automatically be accorded special status based on papers filed with a petition in a parent application. Each continuing application must on its own meet all requirements for special status.

Paperwork Reduction Act: This notice involves information collection requirements which are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). The collections of information involved in this rule have been reviewed and approved by OMB under the emergency processing provisions of 5 CFR 1320.13. The USPTO will publish the notices required by 5 CFR part 1320 in due course.

I. *Requirements:* A petition to make special under the Green Technology Pilot Program may be granted in an application if the eligibility requirements set forth in section II or III and the following conditions are satisfied:

(1) The application must be a non-reissue, non-provisional utility application filed under 35 U.S.C. 111(a), or an international application that has entered the national stage in compliance with 35 U.S.C. 371. The application must be previously filed before the publication date of this notice. Reexamination proceedings are excluded from this pilot program.

(2) The application must be classified in one of the U.S. classifications listed in section VI of this notice at the time of examination. *See* section VI for more information.

(3) The application must contain three or fewer independent claims and twenty or fewer total claims. The application must not contain any multiple dependent claims. For an application that contains more than three independent claims or twenty total claims, or multiple dependent claims, applicants must file a preliminary amendment in compliance with 37 CFR 1.121 to cancel the excess claims and/or the multiple dependent claims at the time the petition to make special is filed.

(4) The claims must be directed to a single invention that materially enhances the quality of the environment, or that materially contributes to: (1) The discovery or development of renewable energy resources; (2) the more efficient utilization and conservation of energy resources; or (3) greenhouse gas emission reduction (see the eligibility requirements of sections II and III of this notice). The petition must include a statement that, if the USPTO determines that the claims are directed to multiple inventions (*e.g.,* in a restriction requirement), applicant will agree to make an election without traverse in a telephonic interview, and elect an invention that meets the eligibility requirements in section II or III of this notice and is classified in one of the U.S. classifications listed in section VI of this notice. *See* section V of this notice for more information.

(5) The petition to make special must be filed electronically before December 8, 2010, using the USPTO electronic filing system, EFS–Web, and selecting the document description of ''Petition for Green Tech Pilot'' on the EFS–Web screen. Applicant should use form PTO/SB/420, which will be available as a Portable Document Format (PDF) fillable form in EFS–Web and on the USPTO Web site at *http://www.uspto.gov/web/forms/index.html*. Information regarding EFS–Web is available on the USPTO Web site at *http://www.uspto.gov/ebc/index.html*.

(6) The petition to make special must be filed at least one day prior to the date that a first Office action (which may be an Office action containing only a restriction requirement) appears in the Patent Application Information Retrieval (PAIR) system. Applicant may check the status of the application using PAIR.

(7) The petition to make special must be accompanied by a request for early publication in compliance with 37 CFR 1.219 and the publication fee set forth in 37 CFR 1.18(d).

II. *Eligibility Requirements—Applications Pertaining to Environmental Quality:* Patent applications for inventions which materially enhance the quality of the environment under the conditions specified in item V of MPEP § 708.02 will be eligible for the Green Technology Pilot Program. For an application pertaining to environmental quality, the petition to make special must state that special status is sought because the invention materially enhances the quality of the environment by contributing to the restoration or maintenance of the basic life-sustaining natural elements. If the application does not clearly disclose that the claimed invention materially enhances the quality of the environment by contributing to the restoration or maintenance of one of the basic life-sustaining natural elements, the petition must be accompanied by a statement signed by the applicant, assignee, or an attorney/agent registered to practice before the USPTO, in accordance with 37 CFR 1.33(b) explaining how the materiality standard is met. The materiality standard does not permit an applicant to speculate as to how a hypothetical end-user might specially apply the invention in a manner that could materially enhance the quality of the environment. Nor does such standard permit an applicant to enjoy the benefit of advanced examination merely because some minor aspect of the claimed invention may enhance the quality of the environment. *See* MPEP § 708.02 (item V).

III. *Eligibility Requirements—Applications Pertaining to Energy Conservation, Development of Renewable Energy Resources, or Greenhouse Gas Emission Reduction:* Patent applications are also eligible for the Green Technology Pilot Program if the applications are for inventions that materially contribute to: (1) The discovery or development of renewable energy resources; (2) the more efficient utilization and conservation of energy resources; or (3) the reduction of greenhouse gas emissions. The term ''renewable energy resources'' for purposes of the procedure specified in this notice includes hydroelectric, solar, wind, renewable biomass, landfill gas, ocean (including tidal, wave, current, and thermal), geothermal, and municipal solid waste, as well as the transmission, distribution, or other services directly used in providing electrical energy from these sources. The second category would include inventions relating to the reduction of energy consumption in combustion systems, industrial equipment, and household appliances. The third category listed above would include, but is not limited to, inventions that contribute to (1) advances in nuclear power generation technology, or (2) fossil fuel power generation or industrial processes with greenhouse gas-abatement technology (*e.g.,* inventions that significantly improve safety and reliability of such technologies).

The petition to make special for an application directed to development of renewable energy or energy conservation, or directed to greenhouse gas emission reduction, must state the basis for the special status (*i.e.,* whether the invention materially contributes to (1) development of renewable energy resources or energy conservation, or (2) greenhouse gas emission reduction). If the application disclosure is not clear on its face that the claimed invention materially contributes to (1) development of renewable energy or

energy conservation, or (2) greenhouse gas emission reduction, the petition must be accompanied by a statement signed by the applicant, assignee, or an attorney/agent registered to practice before the USPTO, in accordance with 37 CFR 1.33(b) explaining how the materiality standard is met. The materiality standard does not permit an applicant to speculate as to how a hypothetical end-user might specially apply the invention in a manner that could materially contribute to (1) development of renewable energy or energy conservation, or (2) greenhouse gas emission reduction, nor does the standard permit an applicant to enjoy the benefit of advanced examination merely because some minor aspect of the claimed invention may be directed to (1) development of renewable energy or energy conservation, or (2) greenhouse gas emission reduction. *See* MPEP § 708.02 (item VI).

IV. *Decision on Petition to Make Special Under the Green Technology Pilot Program:* If applicant files a petition to make special under the Green Technology Pilot Program, the USPTO will decide on the petition once the application is in condition for examination. If the petition is granted, the application will be accorded special status under the Green Technology Pilot Program. The application will be placed on the examiner's special docket prior to the first Office action, and will have special status in any appeal to the BPAI and also in the patent publication process. The application, however, will be placed on the examiner's amended docket, rather than the examiner's special docket, after the first Office action (which may be an Office action containing only a restriction requirement).

If applicant files a petition to make special under the Green Technology Pilot Program that does not comply with the requirements set forth in this notice, the USPTO will notify the applicant of the deficiency by issuing a notice and applicant will be given only one opportunity to correct the deficiency. If applicant still wishes to participate in the Green Technology Pilot Program, applicant must file a proper petition and make appropriate corrections within one month or thirty days, whichever is longer. The time period for reply is *not* extendable under 37 CFR 1.136(a). If applicant fails to correct the deficiency indicated in the notice within the time period set forth therein, the application will not be eligible for the Green Technology Pilot Program and the application will be taken up for examination in accordance with standard examination procedures.

V. *Requirement for Restriction:* If the claims in the application are directed to multiple inventions, the examiner may make a requirement for restriction in accordance with current restriction practice prior to conducting a search. The examiner will contact the applicant and follow the procedure for the telephone restriction practice set forth in MPEP § 812.01. Applicant must make an election without traverse in a telephonic interview, and elect an invention that meets the eligibility requirements in section II or III of this notice and that is classified in one of the U.S. classifications listed in section VI of this notice. *See* items 2 and 4 of section I of this notice. If the examiner cannot reach the applicant after a reasonable effort or applicant refuses to make an election in compliance with item 4 of section I of this notice, the examiner will treat the first claimed invention that meets the requirements in section II or III and section VI as constructively elected without traverse for examination.

VI. *Classification Requirement:* The classification requirement set forth in this section of the notice will assist the USPTO to balance the workload and gauge resources needed to achieve the goals of the Green Technology Pilot Program. The USPTO recognizes that certain patent applications pertaining to green technologies may be excluded by this requirement. After the twelve-month duration of the pilot program, the USPTO may extend the pilot program to include more classifications depending on the effectiveness of the pilot program and the resources availability.

In order to be eligible for the Green Technology Pilot Program, the application must be classified in one of the U.S. patent classifications (''USPCs'') listed below at the time of examination. The classification descriptions are provided as helpful information, and they will not be used in determining whether an application is eligible. An applicant may suggest a classification for the application, but the applicant may not know the classification of the application at the time of filing a petition to make special under the Green Technology Pilot Program. The USPTO will determine whether this requirement is satisfied once the application is in condition for examination and the petition is being decided.

The following is a list of the eligible classifications:

A. Alternative Energy Production

1. Agricultural waste (USPC 44/589).
2. Biofuel (USPC 44/605; 44/589).
3. Chemical waste (USPC 110/235–259, 346).
4. For domestic hot water systems (USPC 126/634–680).
5. For passive space heating (USPC 52/173.3).
6. For swimming pools (USPC 126/561–568).
7. Fuel cell (USPC 429/12–46).
8. Fuel from animal waste and crop residues (USPC 44/605).
9. Gasification (USPC 48/197R, 197A).
10. Genetically engineered organism (USPC 435/252.3–252.35, 254.11–254.9, 257.2, 325–408, 410–431).
11. Geothermal (USPC 60/641.2–641.5; 436/25–33).
12. Harnessing energy from man-made waste (USPC 75/958; 431/5).
13. Hospital waste (USPC 110/235–259, 346).
14. Hydroelectric (USPC 405/76–78; 60/495–507; 415/25).
15. Industrial waste (USPC 110/235–259, 346).
16. Industrial waste anaerobic digestion (USPC 210/605).
17. Industrial wood waste (USPC 44/589; 44/606).
18. Inertial (*e.g.,* turbine) (USPC 290/51, 54; 60/495–507).
19. Landfill gas (USPC 431/5).
20. Municipal waste (USPC 44/552).
21. Nuclear power—induced nuclear reactions: processes, systems, and elements (USPC 376/all).
22. Nuclear power—reaction motor with electric, nuclear, or radiated energy fluid heating means (USPC 60/203.1).
23. Nuclear power—heating motive fluid by nuclear energy (USPC 60/644.1) Photovoltaic (USPC 136/243–265).
24. Refuse-derived fuel (USPC 44/552).
25. Solar cells (USPC 438/57, 82, 84, 85, 86, 90, 93, 94, 96, 97).
26. Solar energy (USPC 126/561–714; 320/101).
27. Solar thermal energy (USPC 126/561–713; 60/641.8–641.15).
28. Water level (*e.g.,* wave or tide) (USPC 405/76–78; 60/495–507).
29. Wind (USPC 290/44, 55; 307/64–66, 82–87; 415/2.1).

B. Energy Conservation

1. Alternative-power vehicle (*e.g.,* hydrogen) (USPC 180/2.1–2.2, 54.1).
2. Cathode ray tube circuits (USPC 315/150, 151, 199).
3. Commuting, *e.g.,* HOV, teleworking (USPC 705/13).
4. Drag reduction (USPC 105/1.1–1.3; 296/180.1–180.5; 296/181.5).
5. Electric lamp and discharge devices (USPC 313/498–512, 567–643).
6. Electric vehicle (USPC 180/65.1; 180/65.21; 320/109; 701/22; 310/1–310).
7. Emission trading, *e.g.,* pollution credits (USPC 705/35–45).

8. Energy storage or distribution (USPC 307/38–41; 700/295–298; 713/300–340).
9. Fuel cell-powered vehicles (USPC 180/65.21; 180/65.31).
10. Human-powered vehicle (USPC 180/205; 280/200–304.5).
11. Hybrid-powered vehicle (USPC 180/65.21–65.29; 73/35.01–35.13, 112–115, 116–119A, 121–132).
12. Incoherent light emitter structure (USPC 257/79, 82, 88–90, 93, 99–103).
13. Land vehicle (USPC 105/49–61 (electric trains); 180/65.1–65.8 (electric cars)).
14. Optical systems and elements (USPC 359/591–598).
15. Roadway, *e.g.,* recycled surface, all-weather bikeways (USPC 404/32–46).
16. Static structures (USPC 52/309.1–309.17, 404.1–404.5, 424–442, 783.1–795.1).
17. Thermal (USPC 702/130–136).
18. Transportation (USPC 361/19, 20, 141, 152, 218).
19. Watercraft drive (electric powered) (USPC 440/6–7).
20. Watercraft drive (human powered) (USPC 440/21–32).
21. Wave-powered boat motors (USPC 440/9).
22. Wind-powered boat motors (USPC 440/8).
23. Wind-powered ships (USPC 114/102.1–115).

C. Environmentally Friendly Farming

1. Alternative irrigation technique (USPC 405/36–51).
2. Animal waste disposal or recycling (USPC 210/610–611; 71/11–30).
3. Fertilizer alternative, *e.g.,* composting (USPC 71/8–30).
4. Pollution abatement, soil conservation (USPC 405/15).
5. Water conservation (USPC 137/78.2–78.3; 137/115.01–115.28).
6. Yield enhancement (USPC 504).

D. Environmental Purification, Protection, or Remediation

1. Biodegradable (USPC 383/1; 523/124–128; 525/938; 526/914).
2. Bio-hazard, Disease (permanent containment of malicious virus, bacteria, prion) (USPC 588/249–249.5).
3. Bio-hazard, Disease (destruction of malicious virus, bacteria, prion) (USPC 588/299).
4. Carbon capture or sequestration (USPC 95/139–140; 405/129.1–129.95; 423/220–234).
5. Disaster (*e.g.,* spill, explosion, containment, or cleanup) (USPC 405/129.1–129.95).
6. Environmentally friendly coolants, refrigerants, etc. (USPC 252/71–79).
7. Genetic contamination (USPC 422/1–43).
8. Hazardous or Toxic waste destruction or containment (USPC 588/1–261).
9. In atmosphere (USPC 95/57–81, 149–240).
10. In water (USPC 210/600–808; 405/60).
11. Landfill (USPC 405/129.95).
12. Nuclear waste containment or disposal (USPC 588/1–20, 400).
13. Plants and plant breeding (USPC 800/260–323.3).
14. Post-consumer material (USPC 264/36.1–36.22, 911–921; 521/40–49.8).
15. Recovery of excess process materials or regeneration from waste stream (USPC 162/29, 189–191; 164/5; 521/40–49.8; 562/513).
16. Recycling (USPC 29/403.1–403.4; 75/401–403; 156/94; 264/37.1–37.33).
17. Smokestack (USPC 110/345; 422/900).
18. Soil (USPC 405/128.1–128.9, 129.1–129.95).
19. Toxic material cleanup (USPC 435/626–282).
20. Toxic material permanent containment or destruction (USPC 588/all).
21. Using microbes or enzymes (USPC 435/262.5).

Dated: November 30, 2009.

David J. Kappos,

Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

[FR Doc. E9–29207 Filed 12–7–09; 8:45 am]

BILLING CODE 3510–16–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–570–959]

Certain Coated Paper Suitable for High–Quality Print Graphics Using Sheet–Fed Presses from the People's Republic of China: Postponement of Preliminary Determination in the Countervailing Duty Investigation

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

DATES: *Effective Date:* December 8, 2009.

FOR FURTHER INFORMATION CONTACT: David Neubacher, Jennifer Meek or Mary Kolberg, AD/CVD Operations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–5823, (202) 482–2778 and (202) 482–1785 respectively.

SUPPLEMENTARY INFORMATION:

Background

On October 13, 2009, the Department of Commerce (the ''Department'') initiated a countervailing duty investigation of certain coated paper suitable for high–quality print graphics using sheet–fed presses (''certain coated paper'') from the People's Republic of China (''PRC''). *See Certain Coated Paper Suitable for High–Quality Print Graphics Using Sheet–Fed Presses from the People's Republic of China: Initiation of Countervailing Duty Investigation*, 74 FR 53703 (October 20, 2009). Currently, the preliminary determination is due no later than December 17, 2009.

Postponement of Due Date for Preliminary Determination

On November 19, 2009, the Department received a request from Appleton Coated LLC, NewPage Corporation, S.D. Warren Company d/b/a Sappi Fine Paper North America, and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (collectively, ''Petitioners'') to postpone the preliminary determination of the countervailing duty investigation of certain coated paper from the PRC. Under section 703(c)(1)(A) of the Tariff Act of 1930, as amended (''the Act''), the Department may extend the period for reaching a preliminary determination in a countervailing duty investigation until no later than the 130th day after the date on which the administering authority initiates an investigation if the petitioner makes a timely request. In accordance with 19 CFR 351.205(e), Petitioners' request for postponement of the preliminary determination was made 25 days or more before the scheduled date of the preliminary determination. Thus, we are fully extending the due date for the preliminary determination to no later than 130 days after the day on which the investigation was initiated (*i.e.*, February 20, 2010). However, February 20, 2010, falls on a Saturday and it is the Department's long–standing practice to issue a determination the next business day when the statutory deadline falls on a weekend, federal holiday, or any other day when the Department is closed. *See Notice of Clarification: Application of ''Next Business Day'' Rule for Administrative Determination Deadlines Pursuant to the Tariff Act of 1930, As Amended*, 70 FR 24533 (May 10, 2005). Accordingly, the deadline for completion of the preliminary determination is now no later than February 22, 2010.

This notice is issued and published pursuant to section 703(c)(2) of the Act and 19 CFR 351.205(e).

Dated: November 25, 2009.

Ronald K. Lorentzen,

Deputy Assistant Secretary for Import Administration.

[FR Doc. E9–29243 Filed 12–7–09; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

[A–580–809]

Circular Welded Non–Alloy Steel Pipe from the Republic of Korea: Preliminary Results and Rescission in Part of the Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: In response to requests from interested parties, the Department of Commerce (''the Department'') is conducting an administrative review of the antidumping duty order on circular welded non–alloy steel pipe (''CWP'') from the Republic of Korea (''Korea''). The period of review (''POR'') is November 1, 2007, through October 31, 2008. This review covers multiple exporters/producers, one of which is being individually reviewed as a mandatory respondent. We preliminarily determine the mandatory respondent made sales of the subject merchandise at prices below normal value (''NV''). We have assigned the remaining respondents the margin calculated for the mandatory respondent. If these preliminary results are adopted in our final results, we will instruct U.S. Customs and Border Protection (''CBP'') to assess antidumping duties on all appropriate entries. Interested parties are invited to comment on these preliminary results.

DATES: *Effective Date:* December 8, 2009.

FOR FURTHER INFORMATION CONTACT: Alexander Montoro or Nancy Decker, AD/CVD Operations, Office 1, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington DC 20230; telephone (202) 482–0238 or (202) 482–0196, respectively.

SUPPLEMENTARY INFORMATION:

Background

On November 2, 1992, the Department published an antidumping duty order on CWP from Korea. *See Notice of Antidumping Duty Orders: Certain Circular Welded Non–Alloy Steel Pipe from Brazil, the Republic of Korea (Korea), Mexico, and Venezuela, and Amendment to Final Determination of Sales at Less Than Fair Value: Certain Circular Welded Non–Alloy Steel Pipe from Korea*, 57 FR 49453 (November 2, 1992) (''*CWP Order*''). On November 28, 2008, Nexteel Co., Ltd. (''Nexteel'') and A–JU-Besteel Co., Ltd. (''A–JU-Besteel'') timely requested an administrative review of the antidumping duty order on CWP from Korea for the period November 1, 2007, through October 31, 2008. On December 1, 2008, Wheatland Tube Company (''Wheatland'') and United States Steel Corporation (''U.S. Steel''), manufacturers of the domestic like product, also timely requested a review. Wheatland requested the Department conduct an administrative review of the following producers and/or exporters of the subject merchandise: SeAH Steel Corporation (''SeAH''); Hyundai HYSCO; Husteel Co., Ltd. (''Husteel''); Daewoo International Corporation (''Daewoo''); Miju Steel Making Co. (''Miju''); Samsun Steel Co., Ltd. (''Samsun''); Kukje Steel Co., Ltd. (''Kukje''); Nexteel; MSteel Co., Ltd.; Kumkang Industrial Co., Ltd. (''Kumkang''); Histeel Co., Ltd.; Hyundai Corporation; Dongbu Steel Co., Ltd.; Dong–A-Steel Co., Ltd. (''Dong–A''); Korea Iron & Steel Co., Ltd.; Union Pipe Manufacturing Co., Ltd. (''Union Pipe''); Union Steel Co., Ltd; Tianjin Huanbohai Import & Export Co. (''Huanbohai''); Huludao Steel Pipe Industrial Co., Ltd.; Huludao City Steel Pipe; Benxi Northern Steel Pipes Co. (''Benxi Northern''); and Tianjin Shuangjie Steel Pipe Co. (''Shuangjie''). U.S. Steel requested the Department conduct an administrative review of the following producers of subject merchandise: Husteel; Hyundai HYSCO; Nexteel; Samsun; and SeAH. On December 24, 2008, the Department published a notice of initiation of an administrative review of the antidumping duty order on CWP from Korea. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 73 FR 79055 (December 24, 2008) (''*Initiation Notice*'').

On January 13, 2009, Wheatland and U.S. Steel withdrew their requests for a review of Husteel. On March 23, 2009, Wheatland withdrew its request for the following companies: Daewoo; Miju; Samsun; Kukje; MSteel Co., Ltd.; Histeel Co., Ltd.; Hyundai Corporation; Dong–A; Union Pipe; Huanbohai; Huludao Steel Pipe Industrial Co., Ltd.; Huludao City Steel Pipe; Benxi Northern; and Shuangjie. On March 24, 2009, U.S. Steel withdrew its request for a review of Samsun. The Department published a notice of partial rescission for the companies mentioned above on April 14, 2009. *See Circular Welded Non–Alloy Steel Pipe from the Republic of Korea: Partial Rescission of Antidumping Duty Administrative Review*, 74 FR 17158 (April 14, 2009).

In our initiation notice, we indicated that we would select mandatory respondents for review based upon CBP data, and that we would limit the respondents selected for individual review in accordance with section 777A(c)(2) of the Tariff Act of 1930, as amended (''the Act''). *See Initiation Notice*, 73 FR at 79055. In January 2009, we received comments on the issue of respondent selection from Nexteel and Wheatland.

On February 11, 2009, after considering the resources available to the Department, we determined that it was not practicable to examine all producers/exporters of subject merchandise for which a review was requested. As a result, we selected the two largest producers/exporters of CWP from Korea during the POR for individual review in this segment of this proceeding, pursuant to section 777A(c)(2)(B) of the Act. These mandatory respondents were SeAH and Kumkang. *See* Memorandum from Joseph Shuler, International Trade Compliance Analyst, to John M. Andersen, Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, ''Selection of Respondents for the Antidumping Duty Review of Circular Welded Non–Alloy Steel Pipe from the Republic of Korea,'' dated February 11, 2009.

On January 23, 2009, Wheatland submitted a request for a duty absorption determination for a number of producers or exporters subject to this review, including SeAH. The Court of Appeals for the Federal Circuit found that the Department lacks authority to conduct two–and four–year duty absorption inquiries for transitional orders (orders in effect before January 1, 1995). *See FAG Italia S.p.A. v. United States*, 291 F.3d 806, 819 (Fed. Cir. 2002). Since the order for this case is from 1992, we have not conducted a duty absorption inquiry in this proceeding.

On February 12, 2009, we issued the antidumping questionnaire to SeAH and Kumkang. We received section A responses from SeAH and Kumkang on March 5, 2009, and March 20, 2009, respectively. We received the sections B, C and D response from SeAH on April 7, 2009, and we received the

sections B and C response from Kumkang on April 14, 2009.

On April 29, 2009, Wheatland and U.S. Steel separately alleged that Kumkang made comparison home market sales of CWP at prices below the cost of production (''COP'') during the POR. We requested additional information from Wheatland, which we received on May 21, 2009. On June 11, 2009, the Department initiated an investigation to determine whether Kumkang's sales of CWP were made at prices below the COP during the POR. *See* Memorandum from The Team to Susan Kuhbach, Director, Office 1, AD/CVD Enforcement, ''The Petitioner's Allegation of Sales Below the Cost of Production for Kumkang Industrial Co., Ltd.,'' dated June 11, 2009. As a result, on June 12, 2009, the Department requested Kumkang respond to section D of the questionnaire. We received a response from Kumkang on July 24, 2009.

On July 31, 2009, Wheatland withdrew its request for a review of Kumkang. Wheatland is the only party to have requested a review of Kumkang. Pursuant to 19 CFR 351.213(d)(l), the Department will rescind an administrative review, in whole or in part, if the party that requested a review withdraws the request within 90 days of the date of publication of the notice of initiation of the requested review. Although Wheatland withdrew its request for Kumkang after the 90–day period, the Department did not dedicate extensive time and resources to this review, only having issued a supplemental questionnaire to Kumkang. The Department published a notice of partial rescission for Kumkang on August 24, 2009. *See Circular Welded Non–Alloy Steel Pipe From the Republic of Korea: Partial Rescission of Antidumping Duty Administrative Review*, 74 FR 42649 (August 24, 2009).

On September 21, 2009, we issued a supplemental questionnaire for sections A, B and C to SeAH and received a response to our supplemental for section A on October 15, 2009 (''Supplemental A Response''), and a response to our supplemental on sections B and C on October 20, 2009. We sent supplemental questionnaires for section D to SeAH on May 27, July 30, and September 14, 2009, and received responses on June 24, August 26, and October 9, 2009.

On July 22, 2009, the Department published in the **Federal Register** an extension of the time limit for the completion of the preliminary results of this review until no later than November 30, 2009, in accordance with section 751(a)(3)(A) of the Act, and 19 CFR 351.213(h)(2). *See Circular Welded Non–Alloy Steel Pipe from the Republic of Korea: Extension of Time Limit for Preliminary Results of the Antidumping Duty Administrative Review*, 74 FR 36164 (July 22, 2009).

Partial Rescission

On January 23, 2009, Hyundai HYSCO submitted a letter to the Department certifying that the company made no shipments or entries for consumption in the United States of the subject merchandise during the POR.

In response to the Department's query to CBP, CBP data showed POR entries for consumption of subject merchandise from Hyundai HYSCO may have entered U.S. customs territory during the POR. *See* Memorandum to the File from Joseph Shuler, ''Customs Documentation in the Antidumping Duty Administrative Review of Circular Welded Non–Alloy Steel Pipe from the Republic of Korea,'' dated September 8, 2009.

On September 8, 2009, the Department asked Hyundai HYSCO to explain the apparent discrepancy between Hyundai HYSCO's claim that it did not export or sell any subject merchandise to the United States during the POR and the CBP information. Hyundai HYSCO responded on September 22, 2009, re–affirming that it did not export or sell subject merchandise to the United States during the POR, and that it did not know or have reason to know that such merchandise would be exported to the United States during the POR.

The Department has concluded that there is no evidence on the record that, at the time of sale, Hyundai HYSCO had knowledge that these entries were destined for the United States, nor is there evidence that Hyundai HYSCO had knowledge that any of these entries of subject merchandise entered the United States during the POR. *See* Memorandum to the File, from Joseph Shuler, International Trade Compliance Analyst, through Nancy Decker, Program Manager, AD/CVD Operations Office 1, ''Intent to Rescind the Antidumping Duty Administrative Review on Circular Welded Non–Alloy Steel Pipe from the Republic of Korea with respect to Hyundai HYSCO,'' dated November 12, 2009 (''Intent to Rescind Memo''). On November 12, 2009, the Department notified interested parties of its intent to rescind this administrative review and provided interested parties until November 23, 2009, to submit comments on the Intent to Rescind Memo. No interested party submitted any comments. Accordingly, we are rescinding this review with respect to Hyundai HYSCO.

Scope of the Order

The merchandise subject to this review is circular welded non–alloy steel pipe and tube, of circular cross–section, not more than 406.4mm (16 inches) in outside diameter, regardless of wall thickness, surface finish (black, galvanized, or painted), or end finish (plain end, beveled end, threaded, or threaded and coupled). These pipes and tubes are generally known as standard pipes and tubes and are intended for the low–pressure conveyance of water, steam, natural gas, air, and other liquids and gases in plumbing and heating systems, air–conditioning units, automatic sprinkler systems, and other related uses. Standard pipe may also be used for light load–bearing applications, such as for fence tubing, and as structural pipe tubing used for framing and as support members for reconstruction or load–bearing purposes in the construction, shipbuilding, trucking, farm equipment, and other related industries. Unfinished conduit pipe is also included in this review.

All carbon–steel pipes and tubes within the physical description outlined above are included within the scope of this review except line pipe, oil–country tubular goods, boiler tubing, mechanical tubing, pipe and tube hollows for redraws, finished scaffolding, and finished conduit. In accordance with the Department's *Final Negative Determination of Scope Inquiry on Certain Circular Welded Non–Alloy Steel Pipe and Tube From Brazil, the Republic of Korea, Mexico, and Venezuela*, 61 FR 11608 (March 21, 1996), pipe certified to the API 5L line–pipe specification and pipe certified to both the API 5L line–pipe specifications and the less–stringent ASTM A–53 standard–pipe specifications, which falls within the physical parameters as outlined above, and entered as line pipe of a kind used for oil and gas pipelines is outside of the scope of the antidumping duty order.

Imports of these products are currently classifiable under the following Harmonized Tariff Schedule (''HTS'') subheadings: 7306.30.10.00, 7306.30.50.25, 7306.30.50.32, 7306.30.50.40, 7306.30.50.55, 7306.30.50.85, and 7306.30.50.90. Although the HTS subheadings are provided for convenience and customs purposes, our written description of the scope of this proceeding is dispositive.

Application of Facts Available

Section 776(a)(1) and (2) of the Act provides that the Department shall

apply ''facts otherwise available'' if, *inter alia*, necessary information is not on the record or an interested party or any other person (A) withholds information that has been requested, (B) fails to provide information within the deadlines established, or in the form and manner requested by the Department, subject to subsections (c)(1) and (e) of section 782 of the Act, (C) significantly impedes a proceeding, or (D) provides information that cannot be verified as provided by section 782(i) of the Act. Section 782(c)(1) of the Act provides that if an interested party, promptly after receiving a request from the Department for information, notifies the Department that such party is unable to submit the information requested in the requested form and manner, together with a full explanation and suggested alternative form in which such party is able to submit the information, the Department may modify the requirements to avoid imposing an unreasonable burden on that party. Section 782(e) of the Act states that the Department shall not decline to consider information deemed ''deficient'' if: (1) the information is submitted by the established deadline; (2) the information can be verified; (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination; (4) the interested party has demonstrated that it acted to the best of its ability; and (5) the information can be used without undue difficulties.

In section D, part IV of the February 12, 2009, questionnaire, the Department requested that SeAH provide one computer data file reporting the costs incurred to produce the merchandise sold in the U.S. market or the comparison market. On October 27, 2009, SeAH submitted its response to the Department's section D supplemental questionnaire, in which the Department requested SeAH report costs on a quarterly basis. The Department subsequently has discovered that there are 23 control numbers (''CONNUMs'') for which no costs has been reported in the latest COP database submitted by SeAH. Costs for these CONNUMs had previously been reported (on a POR basis) in the original COP database SeAH submitted on April 7, 2009.

Because SeAH failed to report the quarterly cost data for certain CONNUMs, the Department has preliminary determined to apply facts available for these COPs, pursuant to section 776(a)(2)(A) and (B) of the Act. As partial facts available, the Department will use the cost of the next most similar CONNUM as a surrogate for the missing COP information. The Department will issue a supplemental questionnaire to SeAH seeking the COP data for these CONNUMs after the issuance of the preliminary results.

Date of Sale

The Department normally will use the date of invoice, as recorded in the producer's or exporter's records kept in the ordinary course of business, as the date of sale, but may use a date other than the invoice date if the Department is satisfied that a different date better reflects the date on which the material terms of sale are established. *See* 19 CFR 351.401(i).

For its home market sales, SeAH has reported the date the billing document is created in its accounting system as the date of sale. This is the date when the final price and quantity are set and is, in most cases, the same as the date of the shipping invoice.

For its U.S. sales, SeAH reported the date of shipment from Korea as the date of sale because all U.S. sales are produced to order and the quantity ordered is subject to change between order and shipment. In addition, the shipment date from Korea always precedes the date of the invoice to the unaffiliated U.S. customer because SeAH's U.S. affiliate, Pusan Pipe America Inc. (''PPA''), does not invoice the unaffiliated U.S. customer until shortly after the subject merchandise enters into the United States. Because quantity is not finalized until shipment and the shipment date always precedes the invoice date to the U.S. customer, we are relying on the date of shipment from Korea as the U.S. date of sale.

Comparisons to Normal Value

To determine whether SeAH's sales of CWP from Korea to the United States were made at less than normal value (''NV''), we compared constructed export price (''CEP'') to NV, as described in the ''Constructed Export Price'' and ''Normal Value'' sections of this notice below.

Pursuant to section 777A(d)(2) of the Act, we compared the CEP of individual U.S. transactions to monthly weighted–average NVs of the foreign–like product, where there were sales made in the ordinary course of trade, as discussed in the ''Cost of Production Analysis'' section below.

We are using a quarterly costing approach, as described in the ''Normal Value'' section below and, therefore, we have not made price–to-price comparisons outside of a quarter to lessen the distortive effect of comparing non–contemporaneous sales prices during a period of significantly changing costs.

Product Comparisons

In accordance with section 771(16) of the Act, we considered all products produced by SeAH that are covered by the description contained in the ''Scope of the Order'' section above and were sold in the home market during the POR to be the foreign like product for purposes of determining appropriate product comparisons to U.S. sales.

We have relied on five criteria to match U.S. sales of subject merchandise to comparison market sales of the foreign like product: 1) grade; 2) actual pipe size in millimeters; 3) wall thickness; 4) surface finish; and 5) end–finish. Where there were no sales of identical merchandise in the comparison market made in the ordinary course of trade to compare to U.S. sales, we compared U.S. sales to the next most similar foreign like product on the basis of the characteristics listed above.

Level of Trade/Constructed Export Price Offset

In accordance with section 773(a)(1)(B) of the Act, to the extent practicable, we determine NV based on sales in the comparison market at the same level of trade (''LOT'') as the EP or CEP transaction. The LOT in the comparison market is the LOT of the starting–price sales or, when NV is based on CV, the LOT of the sales from which we derive selling, general and administrative (''SG&A'') expenses and profit. For CEP, the LOT is that of the constructed sale from the exporter to the affiliated importer. *See* 19 CFR 351.412(c)(ii). *See also Micron Technology, Inc. v. United States*, 243 F.3d 1301, 1314 (Fed. Cir. 2001).

Where it is not possible to make comparisons at the same LOT, the statute permits the Department to account for the different levels. *See* Section 773(a)(7)(A) of the Act. Specifically, if the comparison market sales are made at multiple LOTs, and the difference in LOTs affects price comparability, as manifested in a pattern of consistent price differences between the sales on which NV is based and comparison market sales at the LOT of the export transaction, the Department makes an upward or downward LOT adjustment in accordance with section 773(a)(7)(A) of the Act. *See Notice of Preliminary Determination of Sales at Less Than Fair Value: Light–Walled Rectangular Pipe and Tube From Mexico*, 73 FR 5515, 5522 (January 30, 2008) (''*LWR Pipe from Mexico*''). Alternatively, for

CEP sales, if the NV LOT is at a more advanced stage of distribution than the LOT of the CEP, but the data available do not provide an appropriate basis to determine a LOT adjustment, we reduce NV by the amount of indirect selling expenses incurred in the foreign comparison market on sales of the foreign like product, but by no more than the amount of the indirect selling expenses incurred for CEP sales. *See* section 773(a)(7)(B) of the Act (the CEP offset provision) and *LWR Pipe from Mexico*, 73 FR at 5522.

To determine whether sales are made at different LOTs, we examine stages in the marketing process and selling functions along the chain of distribution between the producer and the unaffiliated customer. *See*, *e.g.*, *Notice of Preliminary Determination of Sales at Not Less Than Fair Value: Polyethylene Terephthalate Film, Sheet, and Strip from Thailand*, 73 FR 24565 (May 5, 2008); and *LWR Pipe from Mexico*, unchanged in *Notice of Final Determination of Sales at Less Than Fair Value: Light–Walled Rectangular Pipe and Tube from Mexico*, 73 FR 35649 (June 24, 2008). In particular, we analyze whether different selling activities are performed, and whether any price differences (other than those for which other allowances are made under the Act) are shown to be wholly or partly due to a difference in LOT between the CEP and NV. In analyzing differences in selling functions, we determine whether the LOTs identified by the respondent are meaningful. *See Antidumping Duties; Countervailing Duties, Final Rule*, 62 FR 27296, 27371 (May 19, 1997). If the claimed LOTs are the same, we expect that the functions and activities of the seller should be similar. Conversely, if a party claims that LOTs are different for different groups of sales, the functions and activities of the seller should be dissimilar. *See Porcelain–on-Steel Cookware From Mexico: Final Results of Antidumping Duty Administrative Review*, 65 FR 30068 (May 10, 2000) and accompanying Issues and Decision Memorandum at Comment 6.

SeAH reported two channels of distribution in the comparison market, Korea): 1) direct sales to unaffiliated end–users and distributors; and 2) sales to affiliated companies. In the U.S. market, SeAH reported one LOT and one channel of distribution for the CEP sales made through its affiliated company in the United States, PPA. SeAH stated that its U.S. sales were made at a different, less advanced LOT than its comparison market sales. SeAH is not seeking a LOT adjustment, however, because it had no comparison market sales that were at the same LOT as the U.S. CEP sales. Instead, it claims that a CEP offset is warranted. *See* SeAH's section B questionnaire response at 18.

In evaluating SeAH's claim, we examined its activities in each channel of distribution relating to four different types of selling functions: sales process and marketing support, freight and delivery, inventory maintenance and warehousing, and warranty and technical services. Based on our analysis, we preliminarily determine that SeAH's selling activities in the comparison market did not vary significantly by channel of distribution. *See* SeAH's Supplemental A Response at Exhibit A–42. Therefore, we preliminary determine that SeAH sold at one LOT in the comparison market. We further determine preliminarily that SeAH sold at one LOT in the U.S. market.

We then compared the selling functions performed by SeAH for its U.S. sales to the selling functions performed for the single LOT in the comparison market. Record evidence indicates that SeAH undertakes significant activities in the comparison market related to the sales process and marketing support, as well as warehousing, that it does not undertake for its U.S. CEP sales. *See* Memorandum from Alexander Montoro, International Trade Compliance Analyst, to The File, Re: Preliminary Results Calculation Memorandum, dated November 30, 2009 (''Analysis Memo'') and SeAH's Supplemental A Response at Exhibit A–42. These differences in selling functions performed for comparison market and CEP transactions indicate that SeAH's comparison market sales are made at a more advanced stage of distribution than its CEP sales. Consequently, we preliminarily determine that SeAH's comparison market and CEP sales are at different LOTs.

As discussed above, the Department will make a LOT adjustment in these circumstances when the information exists to do so. In this case, because SeAH sold at one LOT in the comparison market, there is no basis upon which to determine whether there is a pattern of consistent price differences between LOTs. Further, we do not have the information that would allow us to examine the price patterns of SeAH's sales of other similar products, and there is no other record evidence upon which a LOT adjustment could be based. Therefore, we have not made a LOT adjustment.

Instead, in accordance with section 773(a)(7)(B) of the Act, we preliminarily determine that a CEP offset is appropriate to reflect that SeAH's comparison market sales are at a more advanced stage than the LOT of SeAH's CEP sales. We based the amount of the CEP offset on comparison market indirect selling expenses and limited the deduction to the amount of the indirect selling expenses deducted from CEP under section 772(d)(1)(D) of the Act. We applied the CEP offset to the NV–CEP comparisons. For a detailed discussion, *see* Analysis Memo.

Constructed Export Price

In accordance with section 772(b) of the Act, CEP is the price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise, or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter.

For purposes of this review, SeAH classified all of its export sales of CWP to the United States as CEP sales. During the POR, SeAH made sales in the United States through its U.S. affiliate, PPA, which then resold the merchandise to unaffiliated customers in the United States. The Department calculated CEP based on the packed, delivered prices to unaffiliated purchasers in the United States, net of early payment discounts and other discounts. We adjusted these prices for movement expenses, including foreign inland freight, international freight, marine insurance, foreign and U.S. brokerage and handling, and U.S. customs duties, in accordance with section 772(c)(2)(A) of the Act.

In accordance with section 772(d)(1) of the Act, we deducted from the starting price those selling expenses that were incurred in selling the subject merchandise in the United States, including imputed credit expenses, warranty expenses, inventory carrying costs, and indirect selling expenses. We also made an adjustment for profit in accordance with section 772(d)(3) of the Act. We used the expenses reported by SeAH in connection with its U.S. sales. *See* Analysis Memo.

Normal Value

A. Cost Averaging Methodology

The Department's normal practice is to calculate an annual weighted–average cost for the entire POR. *See*, *e.g.*, *Certain Pasta From Italy: Final Results of Antidumping Duty Administrative Review*, 65 FR 77852 (December 13, 2000), and accompanying Issues and Decision Memorandum at Comment 18,

and *Notice of Final Results of Antidumping Duty Administrative Review: Carbon and Certain Alloy Steel Wire Rod from Canada*, 71 FR 3822 (January 24, 2006), and accompanying Issues and Decision Memorandum at Comment 5 (explaining the Department's practice of computing a single weighted–average cost for the entire period). However, the Department recognizes that possible distortions may result if our normal annual average cost method is used during a period of significant cost changes. In determining whether to deviate from our normal methodology of calculating an annual weighted average cost, the Department evaluates the case–specific record evidence based on two primary considerations: (1) the change in the cost of manufacturing (''COM'') recognized by the respondent during the POR must be deemed significant; and (2) the record evidence must indicate that sales during the shorter averaging periods could be reasonably linked with the COP or CV during the same shorter averaging periods. *See Stainless Steel Plate in Coils From Belgium: Final Results of Antidumping Duty Administrative Review*, 73 FR 75398, 75399 (December 11, 2008) (''*SSPC from Belgium Final Results*'') and accompanying Issues and Decision Memorandum at Comment 4; *see also Stainless Steel Sheet and Strip in Coils from Mexico; Final Results of Antidumping Duty Administrative Review*, 74 FR 6365 (February 9, 2009) (''*SSSC from Mexico Final Results*'') and accompanying Issues and Decision Memorandum at Comment 5.

1. Significance of Cost Changes

In prior cases, the Department established 25 percent as the threshold (the difference between the high and low quarterly COM divided by the low quarterly COM) for determining that the changes in COM are significant enough to warrant a departure from our standard annual costing approach. *See SSPC from Belgium Final Results* and accompanying Issues and Decision Memorandum at Comment 4; *see also Stainless Steel Sheet and Strip in Coils From Mexico; Preliminary Results of Antidumping Duty Administrative Review*, 73 FR 45708, 45709–45710 (August 6, 2008) (''*SSSC from Mexico Preliminary Results*''), unchanged in *SSSC from Mexico Final Results* and accompanying Issues and Decision Memorandum at Comment 5. In the instant case, record evidence shows that SeAH experienced significant changes (*i.e.*, changes that exceeded 25 percent) between the high and low quarterly COM during the POR and that the change in COM is primarily attributable to the price volatility for carbon steel hot–rolled coils. *See* ''Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Results – SeAH Steel Corporation,'' from Ji Young Oh, Senior Accountant, to Neal M. Halper, Director, Office of Accounting, dated November 30, 2009 (''Cost Calculation Memorandum''). As a result, we have determined for the preliminary results that the changes in COM for SeAH are significant enough to warrant a departure from our standard annual costing approach.

2. Linkage Between Cost and Sales Information

As explained above, the Department preliminarily found cost changes to be significant in this administrative review; thus the Department has evaluated whether there is evidence of linkage between the cost changes and the sales prices during the POR. The Department's definition of linkage does not require direct traceability between specific sales and their specific production cost, but rather relies on whether there are elements that would indicate a reasonable correlation between the underlying costs and the final sales prices charged by the company. *See SSSC from Mexico Final Results* and accompanying Issues and Decision Memorandum at Comment 5; *see also SSPC from Belgium Final Results* and accompanying Issues and Decision Memorandum at Comment 4. These correlative elements may be measured and defined in a number of ways depending on the associated industry, and the overall production and sales processes.

Unlike the situation in *SSPC from Belgium Final Results* where the respondents employed an alloy surcharge mechanism, SeAH has no alloy surcharge mechanism in place. Therefore, in the instant case, we requested that SeAH submit sales and cost summary information for the five most frequently sold CONNUMs in the home and U.S. markets during the POR so that we could evaluate the correlation between changing direct material costs and final sale prices. *See* SeAH's October 27, 2009 submission at Attachment 56. For purposes of this broad analysis, we computed for these sample CONNUMs weight–averaged sale prices, by quarter, based on the reported sales for both U.S. and the home markets, and compared them to the COM by quarter. *See* Cost Calculation Memorandum. As can be seen from the Cost Calculation Memorandum, the quarterly average price and cost changes appear to be reasonably correlated. We performed the same linkage analysis in *Certain Welded Stainless Steel Pipes From the Republic of Korea: Final Results of Antidumping Duty Administrative Review*, 74 FR 31242 (June 30, 2009) and accompanying Issues and Decision Memorandum at Comment 1.

In summary, the facts of this case show a significant change in COM during the POR and that there is a reasonable linkage between costs and sales during the shorter cost periods. Accordingly, we have preliminarily determined that a quarterly costing approach would lead to more appropriate comparisons in our antidumping duty calculations for CWP. Therefore, for the preliminary results, we used indexed annual average direct material costs and annual weighted–average conversion costs to each quarter in the POR for inclusion in the COP and CV calculations for CWP.

B. Selection of Comparison Market

To determine whether there was a sufficient volume of sales in the comparison market, Korea, to serve as a viable basis for calculating NV, we compared SeAH's volume of home market sales of the foreign like product to the volume of its U.S. sales of the subject merchandise, in accordance with section 773(a)(1)(B) of the Act. Because the aggregate volume of SeAH's home market sales of the foreign like product was greater than five percent of its aggregate volume of U.S. sales of the subject merchandise, we determine that the home market was viable for comparison purposes.

C. Affiliated Party Transactions and Arm's–Length Test

SeAH reported sales of the foreign like product to affiliated and unaffiliated customers in the comparison market. The Department calculates NV based on a sale to an affiliated party only if it is satisfied that the price to the affiliated party is comparable to the price at which sales are made to parties not affiliated with the producer or exporter, *i.e.*, sales at ''arm's length.'' *See* 19 CFR 351.403(c). To test whether the sales to affiliates were made at arm's–length prices, we compared on a model–specific basis, the starting prices of sales to affiliated and unaffiliated customers net of all movement charges, direct selling expenses, and packing. In accordance with the Department's current practice, if the prices charged to an affiliated party were, on average, between 98 and 102 percent of the prices charged to unaffiliated parties for merchandise

identical or most similar to that sold to the affiliated party, we considered the sales to be at arm's–length prices and included such sales in the calculation of NV. *See* 19 CFR 351.403(c). Conversely, where sales to the affiliated party did not pass the arm's–length test, all sales to that affiliated party were excluded from the NV calculation. *See Antidumping Proceedings: Affiliated Party Sales in the Ordinary Course of Trade*, 67 FR 69186, 69194 (November 15, 2002).

D. Cost of Production Analysis

We found that SeAH made sales below the COP in the most recently completed segment of this proceeding in which SeAH was examined, and such sales were disregarded. Thus, in accordance with section 773(b)(2)(A)(ii) of the Act, there are reasonable grounds to believe or suspect that SeAH made sales of the subject merchandise in its comparison market at prices below the COP in the current review period. Pursuant to section 773(b)(1) of the Act, we initiated a COP investigation of sales by SeAH.

1. Calculation of Cost of Production

In accordance with section 773(b)(3) of the Act, we calculated SeAH's COP based on the sum of its costs of materials and conversion for the foreign like product, plus an amount for home market SG&A expenses, interest expenses, and packing costs. *See* the ''Test of Comparison Market Sales Prices'' section below for the treatment of comparison market selling expenses. We relied on home market sales and COP information provided by SeAH in its questionnaire responses, except where noted below:

a. During the POR, SeAH purchased carbon steel hot–rolled coil inputs from a home market affiliated company, Pohang Iron and Steel Company (''POSCO''). Carbon steel hot–rolled coil is considered a major input to the production of CWP. Section 773(f)(3) of the Act (the major input rule) states:

> If in the case of a transaction between affiliated persons involving the production by one of such persons of a major input to the merchandise, the administering authority has reasonable grounds to believe or suspect that an amount represented as the value of such input is less than the cost of production of such input, then the administering authority may determine the value of the major input on the basis of the information available regarding such cost of production, if such cost is greater than the amount that would be determined for such input under paragraph (2).

Paragraph 2 of section 773(f) of the Act (transactions disregarded) states:

> A transaction directly or indirectly between affiliated persons may be disregarded if, in the case of any element of value required to be considered, the amount representing that element does not fairly reflect the amount usually reflected in sales of merchandise under consideration in the market under consideration. If a transaction is disregarded under the preceding sentence and no other transactions are available for consideration, the determination of the amount shall be based on the information available as to what the amount would have been if the transaction had occurred between persons who are not affiliated.

In accordance with the major input rule, and as stated in the *SSCC from Mexico Preliminary Results*, 73 FR at 45714, unchanged in *SSSC from Mexico Final Results*, it is the Department's normal practice to use all three elements of the major input rule (*i.e.*, transfer price, COP and market price) where available. In accordance with section 773(f)(3) of the Act (the major input rule), we evaluated transactions between SeAH and its affiliate using the transfer price, COP and market price of carbon steel hot–rolled coil. For the preliminary results, we adjusted SeAH's reported costs to reflect the highest of these three values for SeAH's purchases of hot–rolled coil from POSCO. Because we have determined that shorter cost periods are appropriate for the COP analysis, we have applied the major input rule analysis and calculated the related adjustments on a quarterly basis.

b. We revised SeAH's general and administrative (''G&A'') expenses to include inventory valuation losses.

c. We excluded the long–term interest income generated from retirement and severance deposits from the calculation of interest expense ratio.

d. We adjusted the cost of goods sold denominator used in the G&A expense ratio to reflect our major input and inventory valuation loss adjustments. We also adjusted the cost of goods sold denominator used in the financial expense ratio to reflect our major input adjustment.

See Cost Calculation Memorandum.

2. Test of Comparison Market Sales Prices

In determining whether to disregard home market sales made at prices below the COP, we examined, in accordance with sections 773(b)(1)(A) and (B) of the Act, whether, within an extended period of time, such sales were made in substantial quantities, and whether such sales were made at prices which permitted the recovery of all costs within a reasonable period of time in the normal course of trade. As noted in section 773(b)(2)(D) of the Act, prices are considered to provide for recovery of costs if such prices are above the weighted average per–unit COP for the period of investigation or review.

As discussed above, we have relied on a quarterly costing approach in this review. Similar to that used by the Department in cases of high–inflation (*see, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut–to-Length Carbon–Quality Steel Plate Products from Indonesia*, 64 FR 73164 (December 29, 1999) and accompanying Issues and Decision Memorandum at Comment 1, this methodology restates the quarterly costs on a year–end equivalent basis, calculates an annual weighted–average cost for the POR and then restates it to each respective quarter. We find that this alternative cost calculation method meets the requirements of section 773(b)(2)(D) of the Act.

3. Results of the COP Test

Where less than 20 percent of the respondent's home market sales of a given model were made at prices below the COP, we did not disregard any below–cost sales of that model because we determined that the below–cost sales were not made within an extended period of time and in ''substantial quantities.'' Where 20 percent or more of the respondent's home market sales of a given model were made at prices less than the COP, we disregarded the below–cost sales because: (1) they were made within an extended period of time in ''substantial quantities,'' in accordance with sections 773(b)(2)(B) and (C) of the Act; and (2) based on our comparison of prices to the weighted–average COPs for the POR, they were at prices which would not permit the recovery of all costs within a reasonable period of time, in accordance with section 773(b)(2)(D) of the Act.

Our cost test for SeAH revealed that, for home market sales of certain models, less than 20 percent of the sales of those models were made at prices below the COP. Therefore, we retained all such sales in our analysis and included them in determining NV. Our cost test also indicated that for home market sales of other models, more than 20 percent were sold at prices below the COP within an extended period of time and were at prices which would not permit the recovery of all costs within a

reasonable period of time. Thus, in accordance with section 773(b)(1) of the Act, we excluded these below–cost sales from our analysis and used the remaining above–cost sales to determine NV.

E. Constructed Value

In accordance with section 773(e) of the Act, we calculated CV based on the sum of SeAH's material and fabrication costs, SG&A expenses, profit, and U.S. packing costs. We calculated the COP component of CV as described above in the ''Cost of Production Analysis'' section of this notice. In accordance with section 773(e)(2)(A) of the Act, we based SG&A expenses and profit on the amounts incurred and realized by the respondent in connection with the production and sale of the foreign like product in the ordinary course of trade, for consumption in the foreign country.

F. Calculation of Normal Value Based on Comparison Market Prices

We calculated NV based on packed prices to unaffiliated customers in Korea. We adjusted the starting price by deducting for foreign inland freight, pursuant to section 773(a)(6)(B)(ii) of the Act. We made adjustments for differences in packing, in accordance with sections 773(a)(6)(A) and 773(a)(6)(B)(i) of the Act, and in circumstances of sale (for imputed credit expenses), under section 773(a)(6)(c)(iii) of the Act and 19 CFR 315.410.

When comparing U.S. sales with comparison market sales of similar, but not identical, merchandise, we also made adjustments for physical differences in the merchandise in accordance with section 773(a)(6)(C)(ii) of the Act and 19 CFR 351.411. We based this adjustment on the difference in the variable cost of manufacturing for the foreign like product and subject merchandise. *See* 19 CFR 351.411(b).

G. Price–to CV Comparison

Where we were unable to find a home market match of such or similar merchandise, in accordance with section 773(a)(4) of the Act, we based NV on CV. Where appropriate, we made adjustments to CV in accordance with section 773(a)(8) of the Act.

Currency Conversion

Pursuant to 19 CFR 351.415 and section 773A of the Act, we made currency conversions based on the exchange rates in effect on the date of the U.S. sale, as certified by the Federal Reserve Bank. *See* Import Administration website at: http://ia.ita.doc.gov/exchange/index.html.

Preliminary Results of the Review

We preliminarily determine that a weighted–average dumping margin exists for the respondent for the period November 1, 2007, through October 31, 2008. Respondents other than mandatory respondents normally receive the weighted–average of the margins calculated for those companies selected for individual review (*i.e.*, mandatory respondents), excluding *de minimis* margins or margins based entirely on adverse facts available. In this case, respondents other than SeAH received SeAH's calculated margin as SeAH is the only remaining mandatory respondent.

Manufacturer/exporter	Weighted–average margin percent
SeAH Steel Corporation	4.42
Dongbu Steel Co., Ltd.	4.42
Korea Iron & Steel Co., Ltd	4.42
Union Steel Co., Ltd	4.42
Nexteel Co., Ltd	4.42
A–JU Besteel Co., Ltd	4.42

Public Comment

The Department will disclose calculations performed within five days of the date of publication of this notice to the parties to this proceeding in accordance with 19 CFR 351.224(b). We plan on conducting verification of sales and cost data after these preliminary results. As a result, case briefs for this review will be due no later than one week after the issuance of the last verification report. Rebuttal briefs will be due five days after the deadline for submission of case briefs, pursuant to 19 CFR 351.309(d)(1). Any requests for a hearing must be filed at the time case briefs are due. A hearing, if requested, will be held two days after the rebuttal briefs are due. Issues raised in the hearing will be limited to those raised in the case briefs. Parties submitting arguments in this proceeding are requested to submit with the argument: 1) a statement of the issue, 2) a brief summary of the argument, and 3) a table of authorities, in accordance with 19 CFR 351.309(d)(2). Further, parties submitting case and/or rebuttal briefs are requested to provide the Department with an additional electronic copy of the public version of any such comments on a computer diskette. Case and rebuttal briefs must be served on interested parties in accordance with 19 CFR 351.303(f).

The Department will issue the final results of this administrative review, which will include the results of its analysis of issues raised in any such comments, or at a hearing, if requested, within 120 days of publication of these preliminary results, unless extended. *See* section 751(a)(3)(A) of the Act, and 19 CFR 351.213(h).

Assessment Rates

Upon completion of the administrative review, the Department shall determine, and CBP shall assess, antidumping duties on all appropriate entries, in accordance with 19 CFR 351.212(b)(1). The Department will issue appropriate appraisement instructions for the companies subject to this review directly to CBP 15 days after the date of publication of the final results of this review.

For SeAH, we will calculate importer–specific *ad valorem* duty assessment rates based on the ratio of the total amount of antidumping duties calculated for the examined sales to the total entered value of the sales, as reported by SeAH. *See* 19 CFR 351.212(b)(1).

For the companies which were not selected for individual review, we will use SeAH's cash deposit rate as the assessment rate.

We will instruct CBP to assess antidumping duties on all appropriate entries covered by this review. Pursuant to 19 CFR 351.106(c)(2), we will instruct CBP to liquidate without regard to antidumping duties any entries for which the assessment rate is *de minimis*.

The Department clarified its ''automatic assessment'' regulation on May 6, 2003. *See Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties*, 68 FR 23954 (May 6, 2003) (''*Assessment Policy Notice*''). This clarification will apply to entries of subject merchandise during the POR produced by companies included in these final results of review for which the reviewed companies did not know that the merchandise they sold to the intermediary (*e.g.*, a reseller, trading company, or exporter) was destined for the United States. In such instances, we will instruct CBP to liquidate unreviewed entries at the all–others rate if there is no rate for the intermediary involved in the transaction. *See Assessment Policy Notice* for a full discussion of this clarification.

For Hyundai HYSCO, for which this administrative review is rescinded, the Department will issue appropriate assessment instructions to CBP 15 days after the publication of this notice. We will instruct CBP to liquidate as entered any entries of subject merchandise produced by Hyundai HYSCO.

Cash Deposit Requirements

The following deposit rates will be effective upon publication of the final results of this administrative review for all shipments of CWP from Korea entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided by section 751(a)(2)(C) of the Act: (1) The cash deposit rates for the companies listed above will be the rates established in the final results of this review, except if the rate is less than 0.5 percent and, therefore, *de minimis*, the cash deposit will be zero; (2) for previously reviewed or investigated companies not listed above, the cash deposit rate will continue to be the company–specific rate published for the most recent final results in which that manufacturer or exporter participated; (3) if the exporter is not a firm covered in this review, a prior review, or the original less–than-fair–value (''LTFV'') investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent final results for the manufacturer of the merchandise; and (4) if neither the exporter nor the manufacturer is a firm covered in this or any previous review conducted by the Department, the cash deposit rate will be 4.80 percent, the ''all others'' rate established in the LTFV investigation. *See CWP Order*. These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

These preliminary results of review are issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: November 30, 2009.

Ronald K. Lorentzen,

Deputy Assistant Secretary for Import Administration.

[FR Doc. E9–29237 Filed 12–7–09; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–831]

Fresh Garlic From the People's Republic of China: Preliminary Results of, and Intent To Rescind, in Part, the Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Department) is conducting an administrative review of the antidumping duty order on fresh garlic from the People's Republic of China (PRC) covering the period of review (POR), November 1, 2007 through October 31, 2008. This review covers the 19 producers/exporters of the subject merchandise listed in Attachment 1 to this notice. As discussed below, the Department has preliminarily applied total adverse facts available (AFA) to the six mandatory respondents who each failed to cooperate to the best of its ability in this proceeding. The Department also preliminarily finds that eight companies subject to this review failed to demonstrate their eligibility for separate rate status. In addition, the Department preliminarily grants a separate rate to the four companies, which demonstrated their eligibility for separate rate status. For the rates assigned to each of these companies, see the ''Preliminary Results of Review'' section of this notice.

The Department also intends to preliminarily rescind the review with respect to a certain exporter which timely submitted a ''no shipment'' certification. Interested parties are invited to comment on these preliminary results. If these preliminary results are adopted in our final results of review, we will instruct U.S. Customs and Border Protection (CBP) to assess antidumping duties on entries of subject merchandise during the POR for which assessment rates are above *de minimis.*

DATES: *Effective Date:* December 8, 2009.

FOR FURTHER INFORMATION CONTACT: Scott Lindsay, Nicholas Czajkowski, or Summer Avery, AD/CVD Operations, Office 6, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–0780, (202) 482–1395, and (202) 482–4052, respectively.

SUPPLEMENTARY INFORMATION:

Background

On November 16, 1994, the Department published in the **Federal Register** the antidumping duty order on fresh garlic from the PRC. *See Antidumping Duty Order: Fresh Garlic From the People's Republic of China,* 59 FR 59209 (November 16, 1994) (*Order*). On November 3, 2008, the Department published a notice of opportunity to request an administrative review of the antidumping duty order on fresh garlic from the PRC for the period November 1, 2007 through October 31, 2008. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review and Request for Revocation in Part,* 73 FR 65288 (November 3, 2008).

On December 24, 2008, the Department initiated administrative reviews for 63 producers/exporters of subject merchandise from the PRC. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part,* 73 FR 79055 (December 24, 2008) (*Initiation Notice*). On October 21, 2009, in accordance with 19 CFR 351.213(d)(1), we rescinded the administrative review with respect to 44 companies for whom all relevant requests for review had been withdrawn. *See Fresh Garlic from the People's Republic of China: Partial Rescission of Antidumping Duty Administrative Review,* 74 FR 54029 (October 21, 2009) (*Rescission Notice*).

On November 26, 2008, Anqiu Haoshun Trade Co., Ltd. (Anqiu Haoshun), Hebei Golden Bird Trading Co., Ltd. (Hebei Golden Bird), Jinan Farmlady Trading Co., Ltd. (Jinan Farmlady), Jining Yongjia Trade Co., Ltd. (Jining Yongjia), Jinxiang Tianheng Trade Co., Ltd., Qingdao Tiantaixing Foods Co., Ltd. (Qingdao Tiantaixing), Shandong Jinxiang Zhengyang Import & Export Co., Ltd., and Weifang Chenglong Import & Export Co., Ltd. each timely certified that it had no shipments during the POR.[1] On January 12, 2009, and February 11, 2009, the Department released CBP data to interested parties. Comments on the CBP data and respondent selection were

[1] Petitioners subsequently withdrew their request to review Anqiu Haoshun Trade Co., Ltd., Jinxiang Tianheng Trade Co., Ltd., Qingdao Tiantaixing Foods Co., Ltd., Shandong Jinxiang Zhengyang Import & Export Co., Ltd., and Weifang Chenglong Import & Export Co., Ltd. Thus, the Department rescinded its review of these companies. *See Rescission Notice.* Moreover, we note that there were no requests for review for either Jinan Farmlady or Hebei Golden Bird. Thus, as Jinan Farmlady and Hebei Golden Bird were not named in the *Initiation Notice,* neither company was subject to this review.

due February 17, 2009. No interested parties submitted comments.

On January 23, 2009, Anqiu Friend Food Co., Ltd. (Anqiu Friend), Jinxiang Tianma Freezing Storage Co., Ltd. (Tianma Freezing), Qingdao Xintianfeng Foods Co., Ltd. (Qingdao Xintianfeng), Weifang Hongqiao International Logistic Co., Ltd. (Weifang Hongqiao), and Weifang Shennong Foodstuff Co., Ltd. (Weifang Shennong) timely submitted separate rate certifications. Henan Weite and Shanghai LJ International Trading Co. Ltd. (Shanghai LJ) timely submitted separate rate applications on February 22, 2009.

On March 6, 2009, in accordance with section 777A(c)(2) of the Tariff Act of 1930, as amended (the Act), the Department selected the following companies for individual evaluation in this review: Anqiu Friend; Jining Trans-High Trading Co., Ltd. (Jining Trans-High); Qingdao Saturn International Trade Co., Ltd. (Qingdao Saturn); Shanghai Ever Rich Trade Company (Shanghai Ever Rich); Shenzhen Fanhui Import & Export Co., Ltd. (Shenzhen Fanhui); Shenzhen Xinboda Industrial Co., Ltd. (Shenzhen Xinboda); Tianma Freezing; and Weifang Shennong. *See* Memorandum from Martha V. Douthit, International Trade Analyst, Office 6, Re: Antidumping Administrative Review of Fresh Garlic from the People's Republic of China: Respondent Selection Memorandum (March 6, 2009) (*Respondent Selection Memorandum*), available on file in the Central Records Unit, Room 1117 of the Department's main building.

On March 16, 2009, the Department issued antidumping questionnaires to the eight mandatory administrative review respondents.[2] Anqiu Friend, Qingdao Saturn, and Weifang Shennong responded to the Department's initial questionnaire in a timely manner. Jining Trans-High, Shenzhen Fanhui, and Tianma Freezing did not respond to the Department's questionnaire. On April 13, counsel for Tianma Freezing informed the Department that they were no longer representing Tianma Freezing in this instant proceeding, stating that Tianma Freezing had not made a substantial effort to complete the questionnaire. *See* Letter from Trade Bridge, Re: Fresh Garlic from the PRC—Withdrawal of Representation (April 13, 2009). On May 1, the Department reissued the antidumping duty questionnaire directly to Tianma Freezing. Tianma Freezing did not respond to the reissued questionnaire. On May 27, as explained *infra,* the Department rescinded the review as to the other mandatory respondent, Shenzhen Xinboda. The Department issued supplemental questionnaires to Anqiu Friend, Qingdao Saturn, and Weifang Shennong on July 9, July 24, and July 31, respectively. On July 24, Qingdao Saturn notified the Department that it was no longer participating in this administrative review. *See* Letter from Qingdao Saturn International Trade Co., Ltd., Re: Fresh Garlic from the People's Republic of China (July 24, 2009) (*Qingdao Letter*). On August 17, Anqiu Friend and Weifang Shennong advised the Department that they were no longer participating in this administrative review. *See* Letter from Trade Bridge, Re: Fresh Garlic from the People's Republic of China (August 17, 2009).

On July 14, 2009, the Department extended the deadline for the preliminary results of this administrative review until November 30, 2009. *See Fresh Garlic from the People's Republic of China: Extension of Time Limit for the Preliminary Results of Antidumping Duty Administrative Review,* 74 FR 33995 (July 14, 2009). The Fresh Garlic Producers Association and its individual members (Christopher Ranch L.L.C., The Garlic Company, Valley Garlic, and Vessey and Company, Inc.) (collectively, Petitioners) submitted comments regarding the calculation of a separate rate for these preliminary results on October 7, 2009.

Finally, Anqiu Friend, Anqiu Haoshun, Jinxiang Dongyun Freezing Storage Co., Ltd., Juye Homestead Fruits and Vegetables Co., Ltd., Qingdao Tiantaixing, Qufu Dongbao Import & Export Trade Co., Ltd., Shandong Chenhe International Trading Co., Ltd., Shandong Longtai Fruits and Vegetables Co., Ltd., Shenzhen Fanhui, Shenzhen Sunny Import & Export Co., Ltd., and Weifang Shennong (Anqiu Friend, *et al.*) submitted a letter on November 18, 2009, challenging the Department's determination to rescind the review as to Shenzhen Xinboda.

Period of Review

The POR is November 1, 2007 through October 31, 2008.

Scope of the Order

The products covered by this order are all grades of garlic, whole or separated into constituent cloves, whether or not peeled, fresh, chilled, frozen, provisionally preserved, or packed in water or other neutral substance, but not prepared or preserved by the addition of other ingredients or heat processing. The differences between grades are based on color, size, sheathing, and level of decay. The scope of this order does not include the following: (a) Garlic that has been mechanically harvested and that is primarily, but not exclusively, destined for non-fresh use; or (b) garlic that has been specially prepared and cultivated prior to planting and then harvested and otherwise prepared for use as seed. The subject merchandise is used principally as a food product and for seasoning. The subject garlic is currently classifiable under subheadings 0703.20.0010, 0703.20.0020, 0703.20.0090, 0710.80.7060, 0710.80.9750, 0711.90.6000, and 2005.90.9700 of the Harmonized Tariff Schedule of the United States (HTSUS). Although the HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope of this order is dispositive. In order to be excluded from the *Order,* garlic entered under the HTSUS subheadings listed above that is (1) mechanically harvested and primarily, but not exclusively, destined for non-fresh use or (2) specially prepared and cultivated prior to planting and then harvested and otherwise prepared for use as seed must be accompanied by declarations to CBP to that effect.

Rescission of Shenzhen Xinboda's Review

As noted above, Anqiu Friend, *et al.* submitted a letter on November 18, 2009, challenging the Department's determination to rescind the review as to Shenzhen Xinboda. As the Department stated in its *Rescission Notice,* both Petitioners and Shenzhen Xinboda withdrew their respective requests for review of Shenzhen Xinboda. Although Shenzhen Xinboda's withdrawal was filed after the extended deadline, the Department decided to accept its withdrawal, given that Petitioners timely withdrew their request for review of Shenzhen Xinboda. *See* Memorandum from Jack Zhao, Office 6, Re: Antidumping Administrative Review of Fresh Garlic from the People's Republic of China: Rescission of Review on Shenzhen Xinboda Industrial Co., Ltd. (May 27, 2009) (*Rescission Memorandum*). We

[2] The Department sent the questionnaire to Shanghai Ever Rich via FedEx to the address shown on its business license and separate rate certification from the prior administrative review. This questionnaire was returned as undeliverable. On April 1, 2009, the Department reissued the questionnaire to the address shown on Petitioners' request for review. This questionnaire was also returned as undeliverable. On April 16 and May 1, the Department reissued questionnaires to the above addresses via DHL, which were also returned as undeliverable.

continue to find that consistent with 19 CFR 351.213(d)(1), it was reasonable to extend this deadline and rescind the review for Shenzhen Xinboda.

Intent To Rescind, in Part, the Administrative Review

Under 19 CFR 351.213(d)(3), the Department may rescind a review where there are no exports, sales, or entries of subject merchandise during the respective period of review listed below. In the *Initiation Notice,* the Department stated that any company named in the notice of initiation that had no exports, sales, or entries during the period of review should notify the Department within 30 days of publication of this notice in the **Federal Register**. The Department stated that it would consider rescinding the review only if the company submitted a properly filed and timely statement certifying that it had no exports, sales, or entries of subject merchandise during the period of review. *See Initiation Notice.* The deadline to submit ''no shipment'' certifications was January 23, 2009.

On November 26, 2008, Jining Yongjia timely certified that it had made no shipments of subject merchandise to the United States during the POR. The Department's examination of shipment data from CBP indicates that Jining Yongjia made no entries of subject merchandise during the POR. Consequently, because there is no evidence on the record to indicate that this company had sales of subject merchandise under this order during the POR, pursuant to 19 CFR 351.213(d)(3), the Department is preliminarily rescinding the review with respect to Jining Yongjia.[3]

On August 19, 2009, Shenzhen Greening Trading Co., Ltd. (Shenzhen Greening) submitted an untimely no shipment certification. In its untimely certification, Shenzhen Greening provided no explanation as to why it submitted its certification nearly seven months after the deadline established in the *Initiation Notice* or any argument as to why the Department should consider accepting its untimely submission. Thus, we are not rescinding the review with respect to Shenzhen Greening.

Non-Market Economy Country Status

In every case conducted by the Department involving the PRC, the PRC has been treated as a non-market economy (NME) country. *See, e.g., Polyethylene Retail Carrier Bags from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review and Partial Rescission of Review,* 72 FR 51588, 51590 (September 10, 2007) (unchanged in final results). Pursuant to section 771(18)(C)(i) of the Act, any determination that a foreign country is an NME country shall remain in effect until revoked by the administering authority. *See, e.g., Carbazole Violet Pigment 23 From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review and Rescission in Part,* 71 FR 65073, 65074 (November 7, 2006) (unchanged in final results) (*CVP–23*). None of the parties to this proceeding have contested such treatment.

Separate Rates

In proceedings involving non-market economy (NME) countries, the Department begins with a rebuttable presumption that all companies within the country are subject to government control, and thus, should be assigned a single antidumping duty deposit rate. It is the Department's policy to assign all exporters of subject merchandise subject to review in an NME country a single rate unless an exporter can demonstrate that it is sufficiently independent of government control to be eligible for a separate rate. *See, e.g., Honey from the People's Republic of China: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review,* 70 FR 74764, 74766 (December 16, 2005) (unchanged in final results).

In the *Initiation Notice,* the Department instructed all named firms that wished to qualify for separate rate status in the instant administrative review to complete, as appropriate, either a separate-rate certification or a separate-rate application, due no later than 30 or 60 calendar days, respectively, after publication of the *Initiation Notice. See Initiation Notice,* 73 FR at 79056. The deadlines and requirements for submitting separate rate status documentation applied equally to NME-owned firms, wholly foreign-owned firms, and foreign sellers that purchase and export subject merchandise to the United States. As noted above, Anqiu Friend, Henan Weite, Qingdao Xintianfeng, Shanghai LJ, Tianma Freezing, Weifang Hongqiao, and Weifang Shennong each timely submitted separate-rate documentation.

The Department's separate rate status test to determine whether the exporter is independent from government control does not consider, in general, macroeconomic/border-type controls (*e.g.,* export licenses, quotas, and minimum export prices), particularly if these controls are imposed to prevent dumping. The test focuses, rather, on controls over the investment, pricing, and output decision-making process at the individual firm level. *See, e.g., Notice of Final Determination of Sales at Less than Fair Value: Certain Cut-to-Length Carbon Steel Plate from Ukraine,* 62 FR 61754, 61758 (November 19, 1997), and *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China; Final Results of Antidumping Duty Administrative Review,* 62 FR 61276, 61279 (November 17, 1997).

To establish whether an exporter is sufficiently independent of government control to be eligible for a separate rate, the Department analyzes the exporter in light of select criteria, discussed below. *See Final Determination of Sales at Less Than Fair Value: Sparklers from the People's Republic of China,* 56 FR 20588, 20589 (May 6, 1991) (*Sparklers*); and *Final Determination of Sales at Less Than Fair Value: Silicon Carbide from the People's Republic of China,* 59 FR 22585, 22586–87 (May 2, 1994) (*Silicon Carbide*). Under this test, exporters in NME countries are entitled to separate, company-specific margins when they can demonstrate an absence of government control over exports, both in law (*de jure*) and in fact (*de facto*).

1. Absence of *De Jure* Control

The Department considers the following *de jure* criteria in determining whether an individual company may be granted a separate rate: (1) An absence of restrictive stipulations associated with an individual exporter's business and export licenses; (2) any legislative enactments decentralizing control of companies; or (3) any other formal measures by the government decentralizing control of companies. *See Sparklers,* 56 FR at 20589. Henan Weite and Shanghai LJ placed on the administrative record documents to demonstrate an absence of *de jure* control (*i.e.,* the Company Law of the People's Republic of China (revised in 2005), Regulations of PRC on Administration of Registration of Companies (revised in 2005), the Foreign Trade Law of the People's Republic of China (revised in 2004), the Regulations of the People's Republic of China on the Import and Export of Goods, and the Regulations of the People's Republic of China for Controlling the Registration of Enterprises as Legal Persons). As in prior cases, we analyzed the laws presented to us and found them to establish sufficiently an absence of *de jure* control. *See, e.g., Honey from the*

[3] On November 26, 2008, Hebei Golden Bird and Jinan Farmlady each certified that they made no shipments of subject merchandise to the United States during the POR. However, as noted in footnote 5, neither company was subject to this review.

People's Republic of China: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review, 72 FR 102, 105 (January 3, 2007) (unchanged in final results); *Hand Trucks and Certain Parts Thereof from the People's Republic of China; Preliminary Results and Partial Rescission of Administrative Review and Preliminary Results of New Shipper Review,* 72 FR 937, 944 (January 9, 2007) (unchanged in final results). Thus, we find that evidence on the record supports a preliminary finding of an absence of *de jure* government control with regard to the export activities of Henan Weite and Shanghai LJ.

In addition, Anqiu Friend, Jinxiang Tianma, Qingdao Xintianfeng, Weifang Hongqiao, and Weifang Shennong each certified that, consistent with the most recent segment of this proceeding in which it participated and was granted a separate rate, there is an absence of *de jure* government control of its exports.[4] Each of these company's separate-rate certifications, stated, where applicable, that the company had no relationship with any level of the PRC government with respect to ownership, internal management, and business operations. In this segment, we have no new information on the record that would cause us to reconsider the previous *de jure* control determination with regard to Anqiu Friend, Jinxiang Tianma, Qingdao Xintianfeng, Weifang Hongqiao, and Weifang Shennong. Thus, we find that evidence on the record supports a preliminary finding of an absence of *de jure* government control with regard to the export activities of Anqiu Friend, Jinxiang Tianma, Qingdao Xintianfeng, Weifang Hongqiao, and Weifang Shennong.

2. Absence of De Facto Control

As stated in previous cases, there is evidence that certain enactments of the PRC central government have not been implemented uniformly among different sectors and/or jurisdictions in the PRC. *See Silicon Carbide,* 59 FR at 22586–87. Therefore, the Department has determined that an analysis of *de facto* control is critical in determining whether the respondents are, in fact, subject to a degree of government control which would preclude the Department from assigning separate rates.

The Department typically considers four factors in evaluating whether each respondent is subject to *de facto* government control of its export functions: (1) Whether the export prices are set by, or subject to the approval of, a government authority; (2) whether the respondent has authority to negotiate and sign contracts and other agreements; (3) whether the respondent has autonomy from the government in making decisions regarding the selection of management; and (4) whether the respondent retains the proceeds of its export sales and makes independent decisions regarding the disposition of profits or financing of losses. *See Silicon Carbide,* 59 FR at 22586–87; *see also Final Determination of Sales at Less Than Fair Value: Furfuryl Alcohol from the People's Republic of China,* 60 FR 22544, 22544–45 (May 8, 1995).

The Department conducted a separate-rate analysis for companies subject to the administrative review that submitted separate rate applications. In their separate-rate applications, the companies requesting separate rates submitted evidence indicating an absence of *de facto* governmental control over their export activities. Specifically, for Henan Weite and Shanghai LJ,[5] the evidence we reviewed indicates that: (1) Each company sets its own export prices independent of the government and without the approval of a government authority; (2) each company retains the proceeds from its sales and makes independent decisions regarding the disposition of profits or financing of losses; (3) each company has a general manager, branch manager or division manager with the authority to negotiate and bind the company in an agreement; (4) the general manager is selected by the board of directors or company employees, and the general manager appoints the deputy managers and the manager of each department; and (5) there is no restriction on each company's use of export revenues. The separate-rate applications of each company do not suggest that pricing is coordinated among exporters. During our analysis of the information on the record, we found no information indicating the existence of government control. Therefore, the Department preliminarily finds an absence of *de facto* government control with regard to the export activities of Henan Weite and Shanghai LJ.

In addition, Anqiu Friend, Jinxiang Tianma, Qingdao Xintianfeng, Weifang Hongqiao, and Weifang Shennong each submitted separate rate certifications which stated that, as with the previous period where each company was granted a separate rate, there is an absence of *de facto* government control of each company's exports. The separate-rate respondents' separate-rate certifications, stated, where applicable, that the respondent had no relationship with any level of the PRC government with respect to ownership, internal management, and business operations. In this segment, we have no new information on the record that would cause us to reconsider the previous period's *de facto* control determination with regard to Anqiu Friend, Jinxiang Tianma, Qingdao Xintianfeng, Weifang Hongqiao, and Weifang Shennong. Therefore, the Department preliminarily finds that Henan Weite, Shanghai LJ, Anqiu Friend, Jinxiang Tianma, Qingdao Xintianfeng, Weifang Hongqiao, and Weifang Shennong have established, *prima facie,* that they qualify for separate rates under the criteria established by *Silicon Carbide* and *Sparklers.*

We note that Shanghai Ever Rich, a mandatory respondent, did not file either a separate rate certification or application. Furthermore, as noted above in footnote 6, the questionnaire sent to Shanghai Ever Rich was undeliverable. As such, there is no information on the record which indicates that Shanghai Ever Rich's export activities are free from government control. Thus, we find Shanghai Ever Rich to be part of the PRC-wide entity. In addition, there were seven other companies for which a review was requested but which were not selected as mandatory respondents and which did not submit separate rate documentation. Therefore, we find these

[4] The most recently completed segment of this proceeding in which Anqiu Friend and Weifang Shennong participated and were granted separate rate status was *Fresh Garlic from the People's Republic of China: Final Results and Partial Rescission of the 13th Antidumping Duty Administrative Review and New Shipper Reviews,* 74 FR 29174 (June 19, 2009). The most recently completed segment of this proceeding in which Qingdao Xintianfeng participated and was granted separate rate status was *Fresh Garlic from the People's Republic of China: Final Results and Partial Rescission of the 12th Administrative Review,* 73 FR 34251 (June 17, 2008) (*05/06 Administrative Review*). The most recently completed segment of this proceeding in which Jinxiang Tianma and Weifang Hongqiao participated and were granted separate rate status was *Fresh Garlic From the People's Republic of China: Final Results of the Eleventh New Shipper Reviews,* 72 FR 54896 (September 27, 2007).

[5] In the *Initiation Notice,* the Department notified companies for whom a review was requested and that were assigned a separate rate in the most recent segment of this proceeding in which they participated, that they should certify that they continue to meet the criteria for obtaining a separate rate in this POR. At the time of filing their separate rate documentation, Henan Weite and Shanghai LJ were assigned a separate rate in the most recently completed segment of this proceeding in which they participated. *See 05/06 Administrative Review.* Although eligible to file the shorter separate rate certification, each company filed a separate rate application package, which covers all of the information requested in the separate rate certification. Our analysis of each company's separate rate application materials is discussed below.

companies to be part of the PRC-wide entity. *See* Attachment 2.

Selection of Rate Applicable to Non-Selected Respondents That Qualify for a Separate Rate

The Department must assign a rate to the four cooperative separate rate respondents not selected for individual examination that qualify for a separate rate, *i.e.* Henan Weite, Qingdao Xintianfeng, Shanghai LJ, and Weifang Hongqiao. We note that the statute and the Department's regulations do not directly address the establishment of a rate to be applied to individual companies not selected for examination where the Department limited its examination in an administrative review pursuant to section 777A(c)(2) of the Act. The Department's practice in this regard, in cases involving limited selection based on exporters accounting for the largest volumes of trade, has been to average the rates for the selected companies, excluding zero and *de minimis* rates and rates based entirely on AFA. *See, e.g., Certain Steel Nails from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances,* 73 FR 33977 (June 16, 2008), and accompanying Issues and Decision Memorandum at Comment 23; and *Fresh Garlic from the People's Republic of China: Final Results and Partial Rescission of the 13th Antidumping Duty Administrative Review and New Shipper Reviews,* 74 FR 29174 (June 19, 2009) (*06/07 Administrative Review*). In the instant administrative review, however, the rate for the three mandatory respondents granted ''separate rate status'' is based on total AFA, pursuant to section 776 of the Act. *See* ''Application of Facts Available to Anqiu Friend, Tianma Freezing and Weifang Shennong'' section, below.

While the statute does not specifically address this particular set of circumstances, section 735(c)(5)(B) of the Act does specify the methodology to be followed when a similar fact pattern arises in the context of the all-others rate established in an investigation. While not entirely analogous to the determination of a rate to be applied to responsive separate rate respondents in the context of a NME review, we find the methodology to be instructive in these circumstances.

Section 735(c)(5)(B) of the Act states that in situations where the estimated weighted-average dumping margins established for all exporters and producers individually investigated are zero or *de minimis,* or are determined entirely under section 776 of the Act (facts available section), ''the administering authority may use any reasonable method to establish the estimated all-others rate for exporters and producers not individually investigated, including averaging the estimated weighted average dumping margins determined for the exporters and producers individually investigated.''

The Statement of Administrative Action accompanying the Uruguay Round Agreements Act states that in using any reasonable method to calculate the all-others rate in investigations, ''{t}he expected method in such cases will be to weight-average the zero and *de minimis* margins and margins determined pursuant to the facts available, provided that volume data is available.'' *See* Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103–316, vol. 1 (1994) (SAA) at 873. However, the SAA also provides that ''{i}f this method is not feasible, or if it results in an average that would not be reasonably reflective of potential dumping margins for non-investigated exporters or producers, Commerce may use other reasonable methods.'' *Id.*

In the instant administrative review, the Department preliminarily concludes that it cannot accurately determine a margin based on information provided by the separate rate entities. Specifically, while the separate rates entities have given us some sales volume and value information with respect to subject merchandise, we note that garlic prices vary depending on the type and packaging of the garlic. Because the Department has available, in this garlic administrative review proceeding, information that would not be available in an investigation, namely rates from prior administrative reviews, the expected method articulated in the SAA, averaging rates based entirely on facts available, *de minimis* rates, or zero rates, does not apply. Therefore, we find we may look to other reasonable bases on which to base the margin applied to the separate rate entities subject to this review.

The Department has determined that in cases where we have found dumping margins in previous segments of a proceeding, a reasonable method for determining the rate for non-selected companies is to use the most recent rate calculated for the non-selected company in question, unless we calculated in a more recent review a rate for any company that was not zero, *de minimis* or based entirely on facts available. *See, e.g., Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review,* 73 FR 52273, 52275 (September 9, 2008), and accompanying Issues and Decision Memorandum at Comment 6; *Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews and Rescission of Review in Part,* 73 FR 52823, 52824 (September 11, 2008), and accompanying Issues and Decision Memorandum at Comment 16; *see also Certain Fish Fillets from the Socialist Republic of Vietnam: Notice of Preliminary Results of the New Shipper Review and Fourth Antidumping Duty Administrative Review and Partial Rescission of the Fourth Administrative Review,* 73 FR 52015 (September 8, 2008) (changed in final results as final calculated rate for mandatory respondent was above *de minimis*). The Department has therefore preliminarily determined to assign Henan Weite, Qingdao Xintianfeng, Shanghai LJ, and Weifang Hongqiao, the separate rate margin calculated in the most recently completed administrative review of fresh garlic from the PRC in which a separate rate margin was calculated. *See* Memorandum from Nicholas Czajkowski, Case Analyst, Office 6, Re: Final Results of the Administrative Review of Fresh Garlic from the People's Republic of China: Separate Rate Companies and PRC-Wide Entity—Per-Unit Assessment Rates (June 8, 2009) (Per Unit Memorandum) placed on the record of this review concurrent with these preliminary results.

The per-unit rate of $1.03 per kilogram calculated in the *06/07 Administrative Review* was an average rate based on the Department's thorough examination of the two cooperative companies during that period of review. *See 06/07 Administrative Review,* 74 FR at 29176. Therefore, under the circumstances in the instant review where the margins applied to all mandatory respondents are based entirely on facts available, we find it a reasonable means by which to determine a rate for non-examined cooperative separate rate entities, and have employed this methodology for purposes of these preliminary results.

Application of Facts Available to Anqiu Friend, Tianma Freezing, and Weifang Shennong

As discussed above, subsequent to their submission of separate-rates documentation, Anqiu Friend, Tianma Freezing, and Weifang Shennong were selected as mandatory respondents.

Each of these companies failed to cooperate to the best of its ability by not responding to the Department's questionnaires. We note that mandatory respondents must fully participate in an investigation or administrative review. In other words, a mandatory respondent must respond to all the information that has been requested by the Department and not selectively choose which requests to respond to or which information to submit. It cannot fully participate in one aspect of the review, while simultaneously failing to provide complete, accurate, and verifiable data with respect to other required elements of that review.

In the instant case, in response to the *Initiation Notice,* Anqiu Friend, Tianma Freezing, and Weifang Shennong submitted certain information related to their separate rate status. However, as mandatory respondents, each company failed to cooperate to the best of its ability in the review as a whole by providing incomplete and unverifiable sales, cost, and factors of production data. However, because the Department did not notify Anqiu Friend, Tianma Freezing, and Weifang Shennong in advance of submission of the separate rate information that a respondent would not qualify for separate rate status if it failed to cooperate to the best of its ability throughout the investigation and/or review, Anqiu Friend, Tianma Freezing, and Weifang Shennong will keep their separate rate status. *See, e.g., Amended Final Results of Antidumping Duty Administrative Review and New Shipper Reviews: Wooden Bedroom Furniture From the People's Republic of China,* 72 FR 46957 (August 22, 2007) and accompanying Issues and Decision Memorandum at Comment 43.

Sections 776(a)(1) and (2) of the Act provide that, if necessary information is not available on the record, or if an interested party or any other person (A) withholds information that has been requested by the administering authority; (B) fails to provide such information in a timely matter or in the form or manner requested subject to subsections 782(c)(1) and (e) of the Act; (C) significantly impedes a proceeding under the antidumping statute; or (D) provides such information but the information cannot be verified as provided in section 782(i) of the Act, the administering authority shall, subject to section 782(d) of the Act, use facts otherwise available in reaching the applicable determination.

Where the Department determines that a response to a request for information does not comply with the request, section 782(d) of the Act provides that the Department shall promptly inform the party submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that party with an opportunity to remedy or explain the deficiency. Section 782(d) of the Act additionally states that if the party submits further information that is unsatisfactory or untimely, the administering authority may, subject to subsection (e), disregard all or part of the original and subsequent responses. Section 782(e) of the Act provides that the Department shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by the administering authority if: (1) The information is submitted by the deadline established for its submission; (2) the information can be verified; (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination; (4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by the administering authority with respect to the information; and (5) the information can be used without undue difficulties.

Tianma Freezing did not respond to the Department's original questionnaire, and Anqiu Friend and Weifang Shennong each did not respond to the Department's supplemental questionnaire. Thus, the information necessary for the Department to conduct its analysis is not available in the record. *See* Section 776(a)(1) of the Act. Moreover, the decision by Anqiu Friend, Tianma Freezing, and Weifang Shennong to not respond to the Department's questionnaires constitutes a refusal to provide the Department with information necessary to conduct its antidumping analysis. *See* Sections 776(a)(2)(A) and (B) of the Act. As Anqiu Friend, Tianma Freezing, and Weifang Shennong have withheld necessary information that has been requested by the Department, the Department shall, pursuant to sections 776(a)(1), (a)(2)(A), and (a)(2)(B) of the Act, use facts otherwise available to reach the applicable determination.

Section 776(b) of the Act provides that, if the Department finds that an interested party has failed to comply by not acting to the best of its ability to comply with a request of information, the Department may use an adverse inference in selecting from among the facts otherwise available. Because Anqiu Friend, Tianma Freezing, and Weifang Shennong did not respond to the Department's questionnaires, the Department finds that each of these companies has failed to cooperate by not acting to the best of its ability to comply with the Department's request for information. Tianma Freezing did not request additional time to respond to the Department's questionnaire. Although Anqiu Friend and Weifang Shennong requested additional time to submit their responses to the Department's supplemental questionnaires, which the Department granted, neither company ultimately responded to those supplemental questionnaires. Further, Anqiu Friend and Weifang Shennong affirmatively stated on the record that each was no longer participating in this administrative review. By withholding the requested information, Anqiu Friend, Tianma Freezing, and Weifang Shennong prevented the Department from conducting any company-specific analysis or calculating dumping margins for the POR. Therefore, pursuant to section 776(b) of the Act, the Department preliminarily determines that an inference that is adverse to the interests of Anqiu Friend, Tianma Freezing, and Weifang Shennong is warranted.

Section 776(b) of the Act also provides that an adverse inference may include reliance on information derived from the petition, the final determination in the investigation segment of the proceeding, a previous review under section 751 of the Act or a determination under section 753 of the Act, or any other information placed on the record. The Department's practice, when selecting an AFA rate from among the possible sources of information, has been to ensure that the margin is sufficiently adverse ''as to effectuate the statutory purposes of the adverse facts available rule to induce respondents to provide the Department with complete and accurate information in a timely manner.'' *See, e.g., Notice of Final Determination of Sales at Less than Fair Value: Static Random Access Memory Semiconductors from Taiwan,* 63 FR 8909, 8932 (February 23, 1998) (*SRAMS from Taiwan*). Additionally, the Department's practice has been to assign the highest margin determined for any party in the less-than-fair-value (LTFV) investigation, or in any administrative review of a specific order, to respondents who have failed to cooperate with the Department. *See, e.g., Certain Hot-Rolled Flat-Rolled Carbon Quality Steel Products From Japan: Preliminary Results of Antidumping Duty Administrative* Review, 74 FR 10019 (March 9, 2009)

(unchanged in final results). As such, the Department is assigning Anqiu Friend, Tianma Freezing, and Weifang Shennong the per kilogram rate of $4.71 calculated in the *06/07 Administrative Review. See* Per Unit Memorandum.

Corroboration of Secondary Information Used as Adverse Facts Available

Section 776(c) of the Act provides that, where the Department selects from among the facts otherwise available and relies on ''secondary information,'' the Department shall, to the extent practicable, corroborate that information from independent sources reasonably at the Department's disposal. Secondary information is described in the SAA as ''{i}nformation derived from the petition that gave rise to the investigation or review, the final determination covering the subject merchandise, or any previous review under section 751 concerning the subject merchandise.'' *See* SAA at 870. The SAA states that ''corroborate'' means to determine that the information used has probative value. *Id.* The Department has determined that to have probative value, information must be reliable and relevant. *See, e.g., Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, and Tapered Roller Bearings Four Inches or Less in Outside Diameter, and Components Thereof, from Japan; Preliminary Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews,* 61 FR 57391, 57392 (November 6, 1996) (unchanged in final results). The SAA also states that independent sources used to corroborate such evidence may include, for example, published price lists, official import statistics and customs data, and information obtained from interested parties during the particular investigation or review. *See* SAA at 870; *see also Notice of Preliminary Determination of Sales at Less Than Fair Value: High and Ultra-High Voltage Ceramic Station Post Insulators from Japan,* 68 FR 35627, 35629 (June 16, 2003) (unchanged in final determination); and *Notice of Final Determination of Sales at Less Than Fair Value: Live Swine From Canada,* 70 FR 12181, 12183 (March 11, 2005).

To be considered corroborated, information must be found to be both reliable and relevant. Unlike other types of information, such as input costs or selling expenses, there are no independent sources for calculated dumping margins. The only sources for calculated margins are administrative determinations. The AFA rate we are applying for the current review was calculated with respect to the original investigation of garlic from the PRC. *See Garlic LTFV.* Furthermore, no information has been presented in the current review that calls into question the reliability of this information. Thus, the Department finds that the information is reliable.

With respect to the relevance aspect of corroboration, the Department will consider information reasonably at its disposal to determine whether a margin continues to have relevance. Where circumstances indicate that the selected margin is not appropriate as AFA, the Department will disregard the margin and determine an appropriate margin. *See, e.g., Fresh Cut Flowers From Mexico; Final Results of Antidumping Duty Administrative Review,* 61 FR 6812, 6814 (February 22, 1996). Similarly, the Department does not apply a margin that has been discredited. *See D&L Supply Co.* v. *United States,* 113 F.3d 1220, 1221 (Fed. Cir. 1997) (the Department will not use a margin that has been judicially invalidated). None of these unusual circumstances are present with respect to the rate being used here. Moreover, the rate selected, *i.e.* $4.71 per kilogram, is the rate currently applicable to the PRC-wide entity. The Department assumes that if an uncooperative respondent could have obtained a lower rate, it would have cooperated. *See Rhone Poulenc, Inc.* v. *United States,* 899 F. 2d 1185, 1190–91 (Fed. Cir. 1990); *Ta Chen Stainless Steel Pipe, Inc.* v. *United States,* 24 CIT 841, 848 (2000) (respondents should not benefit from failure to cooperate). As there is no information on the record of this review that demonstrates that this rate is not appropriate to use as AFA in the current review, we determine that this rate has relevance.

As this AFA rate is both reliable and relevant, we determine that it has probative value, and is thus in accordance with the requirement, under section 776(c) of the Act, that secondary information be corroborated to the extent practicable (*i.e.,* that it has probative value).

Application of Facts Available to the PRC-Wide Entity

As stated above in the ''Background'' section, on March 6, 2009, the Department selected Jining Trans-High, Qingdao Saturn, and Shenzhen Fanhui as mandatory respondents. On March 16, the Department sent an antidumping questionnaire to each of these companies. Jining Trans-High and Shenzhen Fanhui did not respond to the questionnaire. Qingdao Saturn did respond to the questionnaire. Subsequently, on July 9, the Department issued Qingdao Saturn a supplemental questionnaire, to which it did not respond. On July 24, Qingdao Saturn notified the Department that it was no longer participating in this administrative review. *See Qingdao Letter.* Unlike Anqiu Friend, Tianma Freezing, and Weifang Shennong, these three mandatory respondents did not submit separate-rate documentation. Thus, the Department has no basis upon which to find that any of these three companies are eligible for separate rate status. Therefore, the Department is treating Jining Trans-High, Qingdao Saturn, and Shenzhen Fanhui as part of the PRC-wide entity. *See* Attachment 2. Because we have determined these three companies to be part of the PRC-wide entity, the PRC-wide entity is now under review. The PRC-wide entity also includes the eight other companies subject to this review which did not file the appropriate separate-rate documentation (*see* Attachment 2).

As noted above, sections 776(a)(1) and (2) of the Act mandate that if necessary information is not available on the record of an antidumping proceeding, or if an interested party or any other person: (A) Withholds information that has been requested by the administering authority; (B) fails to provide such information by the deadlines for the submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 782 of the Act; (C) significantly impedes a proceeding under this title; or (D) provides such information but the information cannot be verified as provided in section 782(i) of the Act, the Department shall, subject to section 782(d) of the Act, use the facts otherwise available in reaching the applicable determination under this title.

As selected respondents, Jining Trans-High, Qingdao Saturn, and Shenzhen Fanhui are required to provide full questionnaire responses. Thus, the decision by Jining Trans-High, Qingdao Saturn, and Shenzhen Fanhui to not respond to the Department's questionnaires and to not participate in this review constitutes a refusal to provide the Department with information necessary to conduct its antidumping analysis. Accordingly, because Jining Trans-High, Qingdao Saturn, and Shenzhen Fanhui are part of the PRC-wide entity, the Department preliminarily finds that the PRC-wide entity did not respond to our requests for information and that necessary information is not available on the record. Moreover, the Department

preliminarily finds that the PRC-wide entity has significantly impeded the proceeding by withholding information and failing to respond to the Department's request for information within the specified deadlines. Therefore, pursuant to sections 776(a)(1) and (a)(2) of the Act, the Department preliminarily determines that the application of facts otherwise available is warranted for the PRC-wide entity. Because Jining Trans-High and Shenzhen Fanhui did not respond to the Department's requests for information, sections 782(d) and (e) of the Act are not applicable.

As noted above, Section 776(b) of the Act provides that the Department may use an adverse inference in applying the facts otherwise available when a party has failed to cooperate by not acting to the best of its ability to comply with a request for information. Section 776(b) of the Act also authorizes the Department to use as AFA information derived from the petition, the final determination, a previous administrative review, or other information placed on the record.

Pursuant to section 776(b) of the Act, we find the PRC-wide entity, which includes the companies named in Attachment 2, failed to cooperate by not acting to the best of its ability. As noted above, the PRC-wide entity did not provide the requested information, which was in the sole possession of the respondents and could not be obtained otherwise. Thus, because the PRC-wide entity refused to participate fully in this proceeding, we preliminarily determine that in selecting from among the facts otherwise available, an adverse inference is warranted for the PRC-wide entity pursuant to section 776(b) of the Act. By using an inference that is adverse to the interests of the PRC-wide entity, we ensure the companies that are part of the PRC-wide entity will not obtain a more favorable result by failing to cooperate than had they cooperated fully in this review.

In deciding which facts to use as AFA, section 776(b) of the Act and 19 CFR 351.308(c) authorize the Department to rely on information derived from: (1) The petition; (2) a final determination in the investigation; (3) any previous review or determination; or (4) any information placed on the record. In reviews, the Department normally selects, as AFA, the highest rate on the record of any segment of the proceeding. *See, e.g., Freshwater Crawfish Tail Meat from the People's Republic of China; Notice of Final Results of Antidumping Duty Administrative Review,* 68 FR 19504, 19506 (April 21, 2003). The U.S. Court of International Trade (CIT) and the Court of Appeals for the Federal Circuit have consistently upheld the Department's practice in this regard. *See Rhone Poulenc, Inc.* v. *United States,* 899 F.2d 1185, 1190 (Fed. Circ. 1990) (*Rhone Poulenc*); *NSK Ltd.* v. *United States,* 346 F. Supp. 2d 1312, 1335 (CIT 2004) (upholding a 73.55 percent total AFA rate, the highest available dumping margin from a different respondent in a less-than-fair-value investigation); *see also Kompass Food Trading Int'l* v. *United States,* 24 CIT 678, 683–84 (2000) (upholding a 51.16 percent total AFA rate, the highest available dumping margin from a different, fully cooperative respondent); and *Shanghai Taoen International Trading Co., Ltd.* v. *United States,* 360 F. Supp. 2d 1339, 1348 (CIT 2005) (upholding a 223.01 percent total AFA rate, the highest available dumping margin from a different respondent in a previous administrative review).

The Department's practice when selecting an adverse rate from among the possible sources of information is to ensure that the margin is ''sufficiently adverse so as to effectuate the statutory purposes of the adverse facts available rule to induce respondents to provide the Department with complete and accurate information in a timely manner.'' *See SRAMS from Taiwan* at 8932. The Department's practice also ensures ''that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.'' *See* SAA at 870; *see also Notice of Final Determination of Sales at Less than Fair Value: Certain Frozen and Canned Warmwater Shrimp From Brazil,* 69 FR 76910, 76912 (December 23, 2004). In choosing the appropriate balance between providing respondents with an incentive to respond accurately and imposing a rate that is reasonably related to the respondent's prior commercial activity, selecting the highest prior margin ''reflects a common sense inference that the highest prior margin is the most probative evidence of current margins, because, if it were not so, the importer, knowing of the rule, would have produced current information showing the margin to be less.'' *See Rhone Poulenc,* 899 F.2d at 1190.

Consistent with the statute, court precedent, and its normal practice, the Department has preliminarily assigned the rate of $4.71 per kilogram, the highest rate determined in any segment of this proceeding, to the PRC-wide entity, which includes the companies named in Attachment 2. *See 06/07 Administrative Review.* As discussed further in the ''Corroboration of Secondary Information Used as Adverse Facts Available'' section above, this rate has been corroborated.

Preliminary Results of Review

As a result of our review, we preliminarily determine that the following margins exist for the period November 1, 2007 through October 31, 2008: [6]

FRESH GARLIC FROM THE PRC 2007–2008 ADMINISTRATIVE REVIEW

Manufacturer/exporter	Weighted-average margin (dollars per kilogram)
Henan Weite	1.03
Qingdao Xintianfeng Foods Co., Ltd.	1.03
Shanghai LJ International Trading Co., Ltd.	1.03
Weifang Hongqiao International Logistic Co., Ltd.	1.03
Anqiu Friend Food Co., Ltd.	4.71
Jinxiang Tianma Freezing Storage Co., Ltd.	4.71
Weifang Shennong Foodstuff Co., Ltd.	4.71
PRC-wide Entity (*see* Attachment 2)	4.71

[6] As discussed above, the Department selected eight mandatory respondents. Because we previously rescinded this review with respect to Shenzhen Xinboda, the preliminary results relate to the remaining seven respondents, including Shanghai Ever Rich, which, as discussed in footnote 10 above, has been found to be part of the PRC-wide entity.

Disclosure

We will disclose the calculations used in our analysis to parties to these proceedings within five days of the date of publication of this notice. *See* 19 CFR 351.224(b).

Comments

Interested parties are invited to comment on the preliminary results and may submit case briefs and/or written comments within 30 days of the date of publication of this notice. *See* 19 CFR 351.309(c)(ii). Rebuttal briefs, limited to issues raised in the case briefs, will be due five days later, pursuant to 19 CFR 351.309(d). Parties who submit case or rebuttal briefs in these proceedings are requested to submit with each argument: (1) A statement of the issue, and (2) a brief summary of the argument. Parties are requested to provide a summary of the arguments not to exceed five pages and a table of statutes, regulations, and cases cited. Additionally, parties are requested to provide their case briefs and rebuttal briefs in electronic format (*e.g.,* preferably Microsoft Word or Adobe Acrobat). Interested parties who wish to request a hearing, or to participate if one is requested, must submit a written request to the Assistant Secretary for Import Administration within 30 days of the date of publication of this notice. Requests should contain: (1) The party's name, address, and telephone number; (2) the number of participants; and (3) a list of issues to be discussed. *See* 19 CFR 351.310(c). Issues raised in the hearing will be limited to those raised in case and rebuttal briefs. The Department will issue the final results of these reviews, including the results of its analysis of issues raised in any such written briefs or at the hearing, if held, not later than 120 days after the date of publication of this notice.

Assessment Rates

Pursuant to 19 CFR 351.212(b), the Department will determine, and CBP shall assess, antidumping duties on all appropriate entries. For assessment purposes, where possible, the Department normally calculates importer-specific assessment rates for fresh garlic from the PRC. However, as discussed above, we are not calculating any company-specific antidumping duties in these preliminary results. As such, it is not possible to calculate importer-specific assessment rates in this review. Rather, those companies demonstrating eligibility for a separate rate (Henan Weite, Qingdao Xintianfeng, Shanghai LJ, and Weifang Hongqiao) were assigned the most recently calculated separate rate, while Anqiu Friend, Tianma Freezing, and Weifang Shennong were assigned a separate rate based on total AFA. Other companies subject to review (discussed in detail above and listed in Attachment 2) are found to be part of the PRC-wide entity. If these preliminary results are adopted in the final results of this review, we will instruct CBP to assess antidumping duties on entries of subject merchandise during the period of review as follows.

Consistent with the *06/07 Administrative Review,* we will direct CBP to assess a per-unit (*i.e.,* per kilogram) amount on each entry of the subject merchandise during the POR. In the *06/07 Administrative Review,* we calculated a per-unit assessment rate for separate rate companies, which is the same separate rate (both in value and per unit terms) applicable in this review. *See* Per Unit Memorandum. This same per-unit assessment will be applied to subject merchandise exported by Henan Weite, Qingdao Xintianfeng, Shanghai LJ, or Weifang Hongqiao.

Also in the *06/07 Administrative Review,* we calculated per-unit assessment rates for the companies that were determined to be part of the PRC-wide entity. *See* Per Unit Memorandum. This is the highest per unit rate calculated in any segment of the proceeding and, as such, will be applied in this review to all companies that are part of the PRC-wide entity. (*See* Attachment 2). In addition, this same per-unit assessment rate will be applied to entries of subject merchandise exported by Anqiu Friend, Tianma Freezing, or Weifang Shennong as total AFA. The Department intends to issue appropriate assessment instructions directly to CBP 15 days after publication of the final results of this review.

Cash Deposit Requirements

Consistent with *06/07 Administrative Review,* we will establish and collect a per-kilogram cash deposit amount which will be equivalent to the company-specific dumping margin published in the final results of this review. Specifically, the following cash deposit requirements will be effective upon publication of the final results of this review for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results, as provided by section 751(a)(1) of the Act: (1) For subject merchandise exported by Henan Weite, Qingdao Xintianfeng, Shanghai LJ, or Weifang Hongqiao, the cash deposit rate will be the per-unit rate determined in the final results of the administrative review; (2) for subject merchandise exported by Anqiu Friend, Tianma Freezing, or Weifang Shennong the cash deposit rates will be the per-unit rate determined in the final results of the administrative review; (3) for subject merchandise exported by PRC exporters subject to this administrative review that have not been found to be entitled to a separate rate (*see* Attachment 2), the cash deposit rate will be the per-unit PRC-wide rate determined in the final results of administrative review; (4) for subject merchandise exported by all other PRC exporters of subject merchandise that have not been found to be entitled to a separate rate, the cash deposit rate will be the per-unit PRC-wide rate determined in the final results of administrative review; (5) for previously-investigated or previously-reviewed PRC and non-PRC exporters who received a separate rate in a prior segment of the proceeding (which were not reviewed in this segment of the proceeding), the cash deposit rate will continue to be the rate assigned in that segment of the proceeding; (6) the cash deposit rate for non-PRC exporters of subject merchandise which have not received their own rate will be the rate applicable to the PRC exporter that supplied that non-PRC exporter. These requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

This administrative review and notice are in accordance with sections 751(a)(1) and 777(i) of the Act and 19 CFR 351.213.

Dated: November 30, 2009.

Ronald K. Lorentzen,

Deputy Assistant Secretary for Import Administration.

Attachment 1—Companies Subject to the Administrative Review

1. Anqiu Friend Food Co., Ltd.
2. Henan White.
3. Heze Ever-Best International Trade Co., Ltd. (f/k/a Shandong Heze International Trade and Developing Company).
4. Jinan Trans-High Trading Co., Ltd.
5. Jinan Yipin Corporation Ltd.
6. Jining Yongjia Trade Co., Ltd.

7. Jinxiang Dongyun Freezing Storage Co., Ltd. (a/k/a Jinxiang Eastward Shipping Import and Export Limited Company).
8. Jinxiang Shanyang Freezing Storage Co., Ltd.
9. Jinxiang Tianma Freezing Storage Co., Ltd.
10. Qingdao Xintianfeng Foods Co., Ltd.
11. Qingdao Saturn International Trade Co., Ltd.
12. Qufu Dongbao Import & Export Trade Co., Ltd.
13. Shanghai Ever Rich Trade Company.
14. Shanghai LJ International Trading Co., Ltd.
15. Shenzhen Fanhui Import & Export Co., Ltd.
16. Shenzhen Greening Trading Co., Ltd.
17. Taiyan Ziyang Food Co., Ltd.
18. Weifang Hongqiao International Logistic Co., Ltd.
19. Weifang Shennong Foodstuff Co., Ltd.

Attachment 2—Companies Under Review Subject to the PRC-Wide Rate

1. Jinan Trans-High Trading Co., Ltd.
2. Qingdao Saturn International Trade Co., Ltd.
3. Shenzhen Fanhui Import & Export Co., Ltd.
4. Heze Ever-Best International Trade Co., Ltd. (f/k/a Shandong Heze International Trade and Developing Company).
5. Jinan Yipin Corporation Ltd.
6. Jinxiang Dongyun Freezing Storage Co., Ltd. (a/k/a Jinxiang Eastward Shipping Import and Export Limited Company).
7. Jinxiang Shanyang Freezing Storage Co., Ltd.
8. Qufu Dongbao Import & Export Trade Co., Ltd.
9. Shenzhen Greening Trading Co., Ltd.
10. Shanghai Ever Rich Trade Company.
11. Taiyan Ziyang Food Co., Ltd.

[FR Doc. E9–29239 Filed 12–7–09; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XT21

Marine Mammals; File No. 555–1870

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; receipt of application for permit amendment.

SUMMARY: Notice is hereby given that James T. Harvey, Ph.D., Moss Landing Marine Laboratories, 8272 Moss Landing Road, Moss Landing, CA 95039, has applied for an amendment to Scientific Research Permit No. 555–1870–00.

DATES: Written, telefaxed, or e-mail comments must be received on or before January 7, 2010.

ADDRESSES: The application and related documents are available for review by selecting ''Records Open for Public Comment'' from the *Features* box on the Applications and Permits for Protected Species home page, *https://apps.nmfs.noaa.gov*, and then selecting File No. 555–1870 from the list of available applications.

These documents are also available upon written request or by appointment in the following offices:

Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301)713–2289; fax (301)713–0376; and

Southwest Region, NMFS, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802–4213; phone (562)980–4001; fax (562)980–4018.

Written comments on this application should be submitted to the Chief, Permits, Conservation and Education Division, at the address listed above. Comments may also be submitted by facsimile to (301)713–0376, or by email to *NMFS.Pr1Comments@noaa.gov*. Please include the File No. in the subject line of the email comment.

Those individuals requesting a public hearing should submit a written request to the Chief, Permits, Conservation and Education Division at the address listed above. The request should set forth the specific reasons why a hearing on this application would be appropriate.

FOR FURTHER INFORMATION CONTACT: Amy Sloan or Tammy Adams, (301)713–2289.

SUPPLEMENTARY INFORMATION: The subject amendment to Permit No. 555–1870–00 is requested under the authority of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*), and the regulations governing the taking and importing of marine mammals (50 CFR part 216).

Permit No. 555–1870–00, issued on April 10, 2007(74 FR 19469), authorizes the permit holder to conduct research on the biology and ecology of harbor seals (Phoca vitulina) in California, Oregon, Washington, and Alaska. Researchers are authorized to capture, handle, flipper tag, instrument, and biologically sample (blood, skin, hair, swabs, lavage/enema) 670 harbor seals annually; an additional 2,910 seals may be taken by incidental disturbance during capture, scat collection, experimental harassment, and exposure to playback of vocalizations annually. Of those animals captured, 140 may have surgical procedures conducted to implant subcutaneous radio transmitters. Up to two incidental mortalities per year are authorized. California sea lions and northern elephant seals are authorized to be incidentally harassed during research activities.

The permit holder is requesting the permit be amended to include authorization for increasing the number of harbor seal pups of both sexes captured in California from 40 animals (20 of each sex) to 70 (35 of each sex) annually to allow for a more robust survival estimate model. The applicant also proposes to bring a subset of harbor seals captured in California (seals one year or older of either sex excluding pregnant or lactating females) into temporary captivity in quarantine at The Marine Mammal Center (Sausalito, California) to conduct trials to modify the currently permitted sedation and surgical protocols for subcutaneous implantation of radio transmitters. The purposes of these modifications are to (1) minimize the amount of time needed for surgery; and (2) test three different tag types and a revised suture protocol to improve tag retention. The amendment would be valid through the expiration date on April 15, 2012.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), an initial determination has been made that the activity proposed is categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement.

Concurrent with the publication of this notice in the **Federal Register**, NMFS is forwarding copies of this application to the Marine Mammal Commission and its Committee of Scientific Advisors.

Dated: December 2, 2009.

Tammy C. Adams,

Acting Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. E9–29259 Filed 12–7–09; 8:45 am]

BILLING CODE 3510–22–S

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9090–4]

Agency Information Collection Activities OMB Responses

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This document announces the Office of Management and Budget (OMB) responses to Agency Clearance requests, in compliance with the Paperwork Reduction Act (44 U.S.C.

3501 *et seq.*). An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA regulations are listed in 40 CFR part 9 and 48 CFR chapter 15.

FOR FURTHER INFORMATION CONTACT: Rick Westlund (202) 566–1682, or e-mail at *westlund.rick@epa.gov* and please refer to the appropriate EPA Information Collection Request (ICR) Number.

SUPPLEMENTARY INFORMATION:

OMB Responses to Agency Clearance Requests

OMB Approvals

EPA ICR Number 2100.04; Reporting Requirements under EPA's Climate Leaders Partnership (Change); was approved on 11/16/2009; OMB Number 2060–0532; expires on 04/30/2012; Approved without change.

EPA ICR Number 0113.10; NESHAP for Mercury; 40 CFR part 61, subpart E and 40 CFR part 61, subpart A; was approved on 11/18/2009; OMB Number 2060–0097; expires on 11/30/2012; Approved without change.

EPA ICR Number 1428.08; Trade Secret Claims for Emergency Planning and Community Right-to-Know Act (Renewal); 40 CFR part 350; was approved on 11/18/2009; OMB Number 2050–0078; expires on 11/30/2012; Approved with change.

EPA ICR Number 0976.14; Notification of Regulated Waste Activity and 2009 Hazardous Waste Report (Renewal); 40 CFR 262.12, 262.40, 262.41, 262.75, 263.11, 264.1, 264.11, 264.75, 265.1, 265.22, 265.75, 266.21, 266.22, 266.23, 266.70, 266.80, 266.100, 266.108, 270.1, 270.30, 273.32, 273.60, 279.42, 279.62, and 279.73, was approved on 11/18/2009; OMB Number 2050–0024; expires on 11/30/2011; Approved without change.

EPA ICR Number 1188.09; TSCA Section 5(a); 40 CFR part 721; was approved on 11/30/2009; OMB Number 2070–0038; expires on 11/30/2012; Approved without change.

EPA ICR Number 2300.03; Regulation to Establish Mandatory Reporting of Greenhouse Gases; 40 CFR parts 86, 89, 90, 94, 98, 600, 1033, 1039, 1042, 1045, 1048, 1051, 1054 and 1065, was approved on 11/30/2009; OMB Number 2060–0629; expires on 11/30/2012; Approved with change.

EPA ICR Number 1633.15; Acid Rain Program under Title IV of the Clean Air Act Amendments (Renewal); 40 CFR parts 72–78; was approved on 11/30/2009; OMB Number 2060–0258; expires on 11/30/2012; Approved with change.

EPA ICR Number 1894.06; NESHAP for Secondary Aluminum Production; 40 CFR part 63, subpart A and 40 CFR part 63, subpart RRR; was approved on 11/30/2009; OMB Number 2060–0433; expires on 11/30/2012; Approved without change.

EPA ICR Number 0649.10; NSPS for Metal Furniture Coating; 40 CFR part 60, subpart A and 40 CFR part 60, subpart EE; was approved on 11/30/2009; OMB Number 2060–0106; expires on 11/30/2012; Approved without change.

Comment Filed

EPA ICR Number 1801.07; NESHAP for the Portland Cement Manufacturing Industry; in 40 CFR part 63, subpart LLL; OMB filed comment on 11/18/2009.

EPA ICR Number 2333.01; Renewable Fuels Standard (RFS2) Program (Proposed Rule); in 40 CFR part 80, subpart M; OMB filed comment on 11/19/2009.

EPA ICR Number 2345.01; Control of Emissions from New Marine Compression-Ignition Engines at or Above 30 Liters per Cylinder (Proposed Rule); in 40 CFR parts 80, 85, 86; OMB filed comment on 11/30/2009.

Disapproved

EPA ICR Number 2212.04; Minority Business Enterprise/Woman Business Enterprise (MBE/WBE) Utilization under Federal Grants Cooperative Agreements and Interagency Agreements (Renewal); was disapproved by OMB on 10/31/2009.

Withdrawn and Continue

EPA ICR Number 1360.10; Underground Storage Tanks: Technical and Financial Requirements, and State Program Approval Procedures; Withdrawn from OMB on 11/02/2009

EPA ICR Number 1648.06; Control Technology Determinations for Equivalent Emission Limitations by Permit under section 112(j) of Clean Air Act; Withdrawn from OMB on 11/30/2009.

Dated: December 1, 2009.

John Moses,

Director, Collections Strategies Division.

[FR Doc. E9–29215 Filed 12–7–09; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9090–6]

Notice of Availability of ''Application of Davis-Bacon Act Wage Requirements to Fiscal Year 2010 Clean Water State Revolving Fund and Drinking Water State Revolving Fund Assistance Agreements''

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of availability of public document.

SUMMARY: The Assistant Administrator for the Office of Water, Environmental Protection Agency, has issued a memo to all EPA Regions giving direction as to the implementation of Davis-Bacon Act requirements included in the Fiscal Year 2010 Appropriations, Public Law 111–88, ''Making appropriations for the Department of the Interior, environment, and related agencies for the fiscal year ending September 30, 2010, and for other purposes,'' enacted on October 30, 2009.

DATES: *Effective Date:* November 30, 2009.

ADDRESSES: The subject memorandum may be viewed and downloaded from EPA's homepage, *http://www.epa.gov/owm/cwfinance/cwsrf/law.htm* or *http://www.epa.gov/safewater/dwsrf/index.html*.

FOR FURTHER INFORMATION CONTACT: Jordan Dorfman, Attorney-Advisor, Municipal Support Division, (202) 564–0614, or Philip Metzger, Attorney-Advisor, Drinking Water Protection Division, (202) 564–3776.

Dated: December 2, 2009.

Peter S. Silva,

Assistant Administrator, Office of Water.

[FR Doc. E9–29213 Filed 12–7–09; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9086–5; Docket ID No. EPA–HQ–ORD–2009–0857]

ICLUS SERGoM v3 User's Manual: ArcGIS Tools and Datasets for Modeling U.S. Housing Density Growth

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of public comment period.

SUMMARY: EPA is announcing a 30-day public comment period for the draft tool and its documentation titled, ''ICLUS

SERGoM v3 User's Manual: ArcGIS Tools and Datasets for Modeling US Housing Density Growth'' (EPA/600/R–09/143). The tool and its documentation were prepared by the National Center for Environmental Assessment within EPA's Office of Research and Development. This draft tool and its documentation can be used to vary housing density and other allocation assumptions used to run land use scenarios for the conterminous US. ICLUS stands for Integrated Climate and Land Use Scenarios, a project which is described in the 2009 EPA Report, ''Land-Use Scenarios: Nation-Scale Housing-Density Scenarios Consistent with Climate Change Storylines.'' These scenarios are broadly consistent with global-scale, peer-reviewed storylines of population growth and economic development, which are used by climate change modelers to develop projections of future climate. SERGoM is the Spatially Explicit Growth Model used to allocate housing on the landscape in the GIS environment. This tool and User's Guide enable users to run SERGoM with the population projections developed for the ICLUS project and allow users to modify the spatial allocation of housing density across the landscape.

The public comment period and the external peer usability review, which will occur after the public comment period, are separate processes that provide opportunities for all interested parties to comment on the document. EPA intends to forward the public comments that are submitted in accordance with this notice to the external peer reviewers prior to their review for their consideration. When finalizing the draft document, EPA intends to consider any public comments that EPA receives in accordance with this notice.

EPA is releasing this draft tool and its documentation solely for the purpose of pre-dissemination peer review under applicable information quality guidelines. This tool and its documentation have not been formally disseminated by EPA. It does not represent and should not be construed to represent any Agency policy or determination.

DATES: The 30-day public comment period begins December 8, 2009, and ends January 7, 2010. Technical comments should be in writing and must be received by EPA by January 7, 2010.

ADDRESSES: The draft Geographic Information System (GIS) tool and its documentation, ''ICLUS SERGoM v3 User's Manual: ArcGIS Tools and Datasets for Modeling US Housing Density Growth'' are available primarily via the Internet on the National Center for Environmental Assessment's home page under the Recent Additions menu at *http://www.epa.gov/ncea.* A limited number of paper copies of the User's Guide are available from the Information Management Team, NCEA; telephone: 703–347–8561; facsimile: 703–347–8691. If you are requesting a paper copy, please provide your name, your mailing address, and the document title, ''ICLUS SERGoM v3 User's Manual: ArcGIS Tools and Datasets for Modeling US Housing Density Growth.''

Comments may be submitted electronically via http://www.regulations.gov, by mail, by facsimile, or by hand delivery/courier. Please follow the detailed instructions provided in the **SUPPLEMENTARY INFORMATION** section of this notice.

FOR FURTHER INFORMATION CONTACT: For information on the public comment period, contact the Office of Environmental Information Docket; telephone: 202–566–1752; facsimile: 202–566–1753; or e-mail: *ORD.Docket@epa.gov.*

For technical information, contact Britta Bierwagen, NCEA; telephone: 703–347–8613; facsimile: 703–347–8694; or e-mail: *bierwagen.britta@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Information About the Project/Document

The GIS tool and its documentation, ''ICLUS SERGoM v3 User's Manual: ArcGIS Tools and Datasets for Modeling US Housing Density Growth,'' enable users to run SERGoM with the population projections developed for the ICLUS project and allow users to modify the spatial allocation of housing density across the landscape. The data provided from the ICLUS project consist of five population scenarios by county for the conterminous US and are available in 5-year increments from 2000 to 2100. The population projections for each US county drive the production of new housing units, which are allocated in response to the spatial pattern of previous growth (*e.g.,* 1990 to 2000), transportation infrastructure, and other basic assumptions. The housing allocation model recomputes housing density in 10-year time steps.

The GIS tool allows users to:

- Replace the ICLUS projected population values to reflect different growth rate assumptions;
- customize housing density patterns by altering household size and travel time assumptions;
- summarize patterns by region, watershed, county, or NLCD 2001 land cover classes;
- reclassify housing density into classes different than those already provided; and
- generate a map of estimated impervious surface based on a housing density map.

II. How To Submit Technical Comments to the Docket at *http://www.regulations.gov*

Submit your comments, identified by Docket ID No. EPA–HQ–ORD 2009–0857, by one of the following methods:

- *http://www.regulations.gov:* Follow the online instructions for submitting comments.
- *E-mail: ORD.Docket@epa.gov.*
- *Fax:* 202–566–1753.
- *Mail:* Office of Environmental Information (OEI) Docket (Mail Code: 2822T), U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460. The phone number is 202–566–1752.
- *Hand Delivery:* The OEI Docket is located in the EPA Headquarters Docket Center, Room 3334, EPA West Building, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center's Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is 202–566–1744. Such deliveries are only accepted during the docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

If you provide comments by mail or hand delivery, please submit three copies of the comments. For attachments, provide an index, number pages consecutively with the comments, and submit an unbound original and three copies.

Instructions: Direct your comments to Docket ID No. EPA–HQ–ORD–2009–0857. Please ensure that your comments are submitted within the specified comment period. Comments received after the closing date will be marked ''late,'' and may only be considered if time permits. It is EPA's policy to include all comments it receives in the public docket without change and to make the comments available online at *http://www.regulations.gov*, including any personal information provided, unless a comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://*

www.regulations.gov or e-mail. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov*, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm*.

Docket: Documents in the docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, such as CBI or other information whose disclosure is restricted by statute. Certain other materials, such as copyrighted material, are publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the OEI Docket in the EPA Headquarters Docket Center.

Dated: November 19, 2009.

Rebecca Clark,

Acting Director, National Center for Environmental Assessment.

[FR Doc. E9–29218 Filed 12–7–09; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9090–5]

Notice of a Project Waiver of Section 1605 (Buy American Requirement) of the American Recovery and Reinvestment Act of 2009 (ARRA) to Frederick County, MD

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Regional Administrator of EPA Region III is hereby granting a project waiver of the Buy American requirements of ARRA Section 1605 under the authority of Section 1605(b)(2) [manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality] to Frederick County for the purchase of a Membrane Bioreactor (MBR) system, at the Ballenger McKinney Enhanced Nutrient Removal Wastewater Treatment Plant (WWTP) expansion. Frederick County indicates that the MBR treatment process is necessary to achieve the wastewater treatment levels required by the National Pollutant Discharge Elimination System (NPDES) permit issued for this WWTP. The MBR system under consideration is manufactured by a company located in Canada and no United States manufacturer produces an alternative that meets Frederick County's technical specifications. This is a project specific waiver and only applies to the use of the specified product for the ARRA funded project being proposed. Any other ARRA project that may wish to use the same product must apply for a separate waiver based on the specific project circumstances. The Regional Administrator is making this determination based on the review and recommendations of the EPA Region III, Water Protection Division, Office of Infrastructure and Assistance. Frederick County has provided sufficient documentation to support its request.

The Assistant Administrator of the EPA's Office of Administration and Resources Management has concurred on this decision to make an exception to Section 1605 of ARRA. This action permits the purchase of the MBR system containing goods not manufactured in America for the proposed project being implemented by Frederick County. It should be noted that for purposes of this action, the MBR, while treated as a single system, is not itself a manufactured good, but is an assembly of manufactured goods.

DATES: *Effective Date:* November 20, 2009.

FOR FURTHER INFORMATION CONTACT: Robert Chominski, Deputy Associate Director, (215) 814–2162, or David McAdams, Environmental Engineer, (215) 814–5764, Office of Infrastructure & Assistance (OIA), Water Protection Division, U.S. EPA Region III, 1650 Arch Street, Philadelphia, PA 19103–2029.

SUPPLEMENTARY INFORMATION: In accordance with ARRA Section 1605(c), EPA hereby provides notice that it is granting a project waiver of the requirements of Section 1605(b)(2) of Public Law 111–5, Buy American requirements to Frederick County for the acquisition of a MBR system manufactured by GE Water and Process Technologies located in Canada. Frederick County has been unable to find an American made MBR system manufacturer to meet its specific wastewater requirements.

Section 1605 of the ARRA requires that none of the appropriated funds may be used for the construction, alteration, maintenance, or repair of a public building or public work unless all of the iron, steel, and manufactured goods used in the project are produced in the United States unless a waiver is provided to the recipient by EPA. A waiver may be provided if EPA determines that (1) applying these requirements would be inconsistent with public interest; (2) iron, steel, and the relevant manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality; or (3) inclusion of iron, steel, and the relevant manufactured goods produced in the United States will increase the cost of the overall project by more than 25 percent.

The GE Zenon MBR system is comprised of MBR filtration cassettes, air dryers and several other auxiliary components integral to the efficient operation of the system. The MBR system is a packaged product that has undergone complex biological design, hydraulic modeling, control automation, fabrication and integration of specialized product components. The GE Zenon MBR system—as a whole, is designed to remove nutrients (Phosphorus and Nitrogen) to a level specified in Frederick County's NPDES permit.

Frederick County's waiver request is to allow the purchase of the GE Zenon MBR system with one hundred forty membrane filtration cassettes, manufactured by GE Water and Process Technologies located in Canada, 2 desiccant air dryers, manufactured by Ingersol Rand located in the United Kingdom, and ten vacuum ejectors manufactured by Piab located in Sweden for use in improvements to its existing WWTP. This project will upgrade its existing WWTP by adding a new MBR treatment process. The membrane filtration cassettes, air dryers and vacuum ejectors are integral components of the MBR treatment process because they separate the treated wastewater from the mixed liquor which comes from the biological reactors, before the treated wastewater is disinfected and discharged. After an engineering analysis of alternate treatment processes, Frederick County

determined MBR to be the most environmentally sound and cost effective solution. The MBR system is an advance waste water treatment process which is designed to meet the high quality effluent requirements of the waste load allocation under the NPDES permit.

In addition, in anticipation of procuring the MBR system, Frederick County had issued specifications for the MBR system in its June 2007 Request for Proposal (RFP) and evaluated and awarded the contract in March 2008. Section 11500 of this RFP No. 07–CP–78 included technical specifications for Membrane Filtration Equipment, and the qualification criteria in Section 1.03 of the bidder questionnaire required an established record of installed systems at municipal WWTPs. Specifically, Section 1.03 of the bidder questionnaire required that: (1) The bidder furnish a list of five of its MBR system installations at municipal WWTPs, (2) three of these systems have been in operation for at least one year, and (3) at least one of the three systems has an average flow design capacity of 1.0 MGD or more. These specifications and requirements were justified by Frederick County's obligation to meet reliably the environmental requirements of its NPDES permit. In this selection phase, no domestic manufacturers were able to meet these technical specifications and experience requirements. In May 2009, Frederick County received bids for the construction of the entire WWTP expansion based on the RFP. The winning general contractor will use the pre-selected MBR design/equipment in the final installation.

Frederick County has provided information to the EPA demonstrating that there are no membrane filtration systems manufactured in the United States in sufficient and reasonable quantity and of a satisfactory quality to meet these technical specifications in its RFP. Two companies, neither of which manufacture in the United States, met Frederick County's justified technical specifications and experience requirements.

The April 28, 2009 EPA HQ Memorandum, Implementation of Buy American provisions of Public Law 111–5, the ''American Recovery and Reinvestment Act of 2009'' (''EPA Memorandum''), defines reasonably available quantity as ''the quantity of iron, steel, or relevant manufactured good is available or will be available at the time needed and place needed, and in the proper form or specification as specified in the project plans and design.'' Frederick County has incorporated specific technical design requirements for installation of a MBR system at its WWTP.

The purpose of the ARRA is to stimulate economic recovery in part by funding current infrastructure construction, not to delay projects that are ''shovel ready'' by requiring communities, such as Frederick County, to revise their standards and specifications, institute a new bidding process, and potentially choose a more costly, less efficient project. The imposition of ARRA Buy American requirements on such projects otherwise eligible for State Revolving Fund assistance would result in unreasonable delay and thus displace the ''shovel ready'' status for this project. To further delay construction is in direct conflict with a fundamental economic purpose of the ARRA, which is to create or retain jobs.

Based on additional research conducted by EPA's Office of Infrastructure and Assistance (OIA) in Region III, and to the best of the Region's knowledge at the time of review, there did not appear to be other MBR systems manufactured domestically back in March 2008 that would meet Frederick County's technical specifications. EPA's national contractor prepared a technical assessment report dated October 16, 2009 based on the waiver request submitted. The report determined that the waiver request submittal was complete, that adequate technical information was provided, and that there were no significant weaknesses in the justification provided. The report confirmed the waiver applicant's claim that only non-domestic manufacturers of the MBR cartridge could meet the technical specifications included in the RFP for Membrane Filtration Equipment and the qualification criteria for an established record of installed systems at WWTPs included in the bidder questionnaire.

Frederick County included a performance guarantee in the RFP as well as the original specification. GE's performance guarantee applies to the entire MBR system, including all components supplied by GE, which would be voided by substitution of other components. The potential voiding of the performance raises a valid issue regarding availability of alternative desiccant air dryers and vacuum ejectors. The existence of such a performance guarantee supports treating the entire MBR system as a unitary whole, rather than a collection of individual components. Therefore, EPA Region III concludes that only the ''GE Zenon MBR System—as a whole'' meets the ''specifications in project plans and design.''

The OIA has reviewed this waiver request and to the best of our knowledge at the time of review has determined that the supporting documentation provided by Frederick County is sufficient to meet the criteria listed under Section 1605(b), OMB's regulations at 2 CFR 176.60–176.170, and in the April 28, 2009, EPA Memorandum: Iron, steel, and the manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality. The basis for this project waiver is the authorization provided in Section 1605(b)(2). Due to the lack of production of this product in the United States in sufficient and reasonably available quantities and of a satisfactory quality in order to meet Frederick County's technical specifications, a waiver from the Buy American requirement is justified.

The March 31, 2009 Delegation of Authority Memorandum provided Regional Administrators with the authority to issue exceptions to Section 1605 of ARRA within the geographic boundaries of their respective regions and with respect to requests by individual grant recipients. Having established both a proper basis to specify the particular good required for this project, and that this manufactured good was not available from a producer in the United States, Frederick County is hereby granted a waiver from the Buy American requirements of Section 1605(a) of Public Law 111–5 for the purchase of a MBR system using ARRA funds as specified in Frederick County's request of August 18, 2009. This supplementary information constitutes the detailed written justification required by Section 1605(c) for waivers ''based on a finding under subsection (b).''

Authority: Pub. L. 111–5, section 1605.

Dated: November 20, 2009.

William C. Early,

Acting Regional Administrator, U.S. Environmental Protection Agency, Region III.

[FR Doc. E9–29214 Filed 12–7–09; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL ELECTION COMMISSION

Sunshine Act Notices

AGENCY: Federal Election Commission.

DATE AND TIME: Thursday, December 3, 2009, at 10 a.m.

PLACE: 999 E Street, NW., Washington, DC, (ninth floor).

STATUS: This meeting will be open to the public.

ITEMS TO BE DISCUSSED:

Correction and Approval of Minutes.

Adoption of Policy to Prepare and Publish a Guidebook for Complainants and Respondents in Enforcement Matters.

Agency Procedure.

Management and Administrative Matters.

Individuals who plan to attend and require special assistance, such as sign language interpretation or other reasonable accommodations, should contact Mary Dove, Commission Secretary, at (202) 694–1040, at least 72 hours prior to the hearing date.

PERSON TO CONTACT FOR INFORMATION: Judith Ingram, Press Officer; *Telephone:* (202) 694–1220.

Mary W. Dove,

Secretary of the Commission.

[FR Doc. E9–29118 Filed 12–7–09; 8:45 am]

BILLING CODE 6715–01–M

FEDERAL HOUSING FINANCE AGENCY

[No. 2009–N–13]

Proposed Collection; Comment Request

AGENCY: Federal Housing Finance Agency.

ACTION: 30-day Notice of submission of information collection for approval from the Office of Management and Budget.

SUMMARY: In accordance with the requirements of the Paperwork Reduction Act of 1995, the Federal Housing Finance Agency (FHFA) is seeking public comments concerning a currently approved information collection known as ''Affordable Housing Program (AHP),'' which has been assigned control number 2590–0007 by the Office of Management and Budget (OMB). FHFA will submit a request to OMB for regular review and approval to renew the information collection for a three-year period. The control number is due to expire on December 31, 2009.

DATES: Interested persons may submit comments on or before January 7, 2010.

Comments: Submit comments to the Office of Information and Regulatory Affairs of the Office of Management and Budget, Attention: Desk Officer for the Federal Housing Finance Agency, Washington, DC 20503, *Fax:* 202–395–6974, *E-mail address: OIRA_Submission@omb.eop.gov*. Please also submit them to FHFA using any one of the following methods:

- *E-mail: RegComments@fhfa.gov.* Please include Proposed Collection; Comment Request: Affordable Housing Program (AHP) (No. 2009–N–##) in the subject line of the message.
- *Mail/Hand Delivery:* Federal Housing Finance Agency, Fourth Floor, 1700 G Street, NW., Washington, DC 20552, Attention: Public Comments/Proposed Collection; Comment Request: Affordable Housing Program (AHP) (No. 2009–N–##).
- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.

We will post all public comments we receive without change, including any personal information you provide, such as your name and address, on the FHFA Web site at *http://www.fhfa.gov*. Send requests for copies of the Affordable Housing Program information collection and supporting documentation to the contact referenced in the For Further Information Contact section. There is no charge for copies.

FOR FURTHER INFORMATION CONTACT: Charles E. McLean, Acting Manager, Division of Housing Mission and Goals, *Charles.Mclean@fhfa.gov*, 202–408–2537; or Deattra D. Perkins, Community Development Specialist, Division of Housing Mission and Goals, *Deattra.Perkins@fhfa.gov*, 202–408–2527 (not toll-free numbers). The telephone number for the Telecommunications Device for the Deaf is 800–877–8339.

SUPPLEMENTARY INFORMATION:

A. Background

Section 10(j) of the Federal Home Loan Bank Act (Bank Act) requires each Bank to establish an affordable housing program, the purpose of which is to enable a Bank's members to finance homeownership by households with incomes at or below 80% of the area median income (low- or moderate-income households), and to finance the purchase, construction, or rehabilitation of rental projects in which at least 20% of the units will be occupied by and affordable for households earning 50% or less of the area median income (very low-income households). 12 U.S.C. 1430(j)(1) and (2). The Bank Act requires each Bank to contribute 10% of its previous year's net earnings to its AHP annually, subject to a minimum annual combined contribution by the 12 Banks of $100 million. 12 U.S.C. 1430(j)(5)(C).

The AHP regulation authorizes a Bank, in its discretion, to set aside a portion of its annual required AHP contribution to establish homeownership set-aside programs for the purpose of promoting homeownership for low- or moderate-income households. *See* 12 CFR 1291.6. Under the homeownership set-aside programs, a Bank may provide AHP direct subsidy (grants) to members to pay for down payment assistance, closing costs, and counseling costs in connection with a household's purchase of its primary residence, and for rehabilitation assistance in connection with a household's rehabilitation of an owner-occupied residence. 12 CFR 1291.6(c)(4). Currently, a Bank may allocate up to the greater of $4.5 million or 35% of its annual required AHP contribution to homeownership set-aside programs in that year.

B. Need for and Use of the Information Collection

The Banks use AHP data collection to determine whether an AHP applicant satisfies the statutory and regulatory requirements to receive AHP subsidies. FHFA's use of the information is necessary to enable and to ensure that Bank funding decisions, and the use of the funds awarded, are consistent with statutory and regulatory requirements. The AHP information collection is found in the Data Reporting Manual (DRM). *See* Resolution Number 2006–13 (available electronically in the FOIA Reading Room: *http://www.fhfa.gov/Default.aspx?Page=256&ListYear=2006&ListCategory=9#9/2006*).

The OMB number for the information collection is 2590–0007. The OMB clearance for the information collection expires on December 31, 2009. The likely respondents are institutions that are Bank members.

C. Burden Estimate

FHFA analyzed the cost and hour burden for the seven facets of the AHP information collection—AHP applications, AHP modification requests, AHP monitoring agreements, AHP recapture agreements, homeownership set-aside program applications, verifications of statutory and regulatory compliance at the time of subsidy disbursement, and Bank Advisory Council reports and recommendations on AHP implementation plans. As explained in more detail below, the estimate for the total annual hour burden for applicant and member respondents for all seven facets of the AHP information collection is 76,214 hours.

1. AHP Applications

FHFA estimates a total annual average of 2,050 applications for AHP funding, with 1 response per applicant, and a 24-hour average processing time for each

application. The estimate for the total annual hour burden for AHP applications is 49,200 hours (2,050 applicants × 1 application × 24 hours).

2. AHP Modification Requests

FHFA estimates a total annual average of 150 modification requests, with 1 response per requestor, and a 2.5-hour average processing time for each request. The estimate for the total annual hour burden for AHP modification requests is 375 hours (150 requestors × 1 request × 2.5 hours).

3. AHP Monitoring Agreements

FHFA estimates a total annual average of 825 AHP monitoring agreements, with 1 agreement per respondent. The estimate for the average hours to implement each AHP monitoring agreement and prepare and review required reports and certifications is 4.75 hours. The estimate for the total annual hour burden for AHP monitoring agreements is 3,919 hours (825 respondents × 1 agreement × 4.75 hours).

4. AHP Recapture Agreements

FHFA estimates a total annual average of 360 AHP recapture agreements, with 1 agreement per respondent. The estimate for the average hours to prepare and implement an AHP recapture agreement is 2 hours. The estimate for the total annual hour burden for AHP recapture agreements is 720 hours (360 respondents × 1 agreement × 2 hours).

5. Homeownership Set-Aside Program Applications

FHFA estimates a total annual average of 10,000 homeownership set-aside program applications, with 1 application per respondent, and a 2 hour average processing time for each application. The estimate for the total annual hour burden for homeownership set-aside program applications is 20,000 hours (10,000 respondents × 1 application × 2 hours).

6. Verification of Statutory and Regulatory Compliance Submissions

FHFA estimates a total annual average of 2,000 submissions to verify compliance with statutory and regulatory requirements with 1 submission per respondent. The estimate for the average hours to review database records for completeness and accuracy prior to submission and validation is 1 hour. The estimate for the total annual hour burden for verification of compliance submissions is 2,000 hours (2,000 respondents × 1 submission × 1 hour).

7. Bank Advisory Council Reports and Recommendations on AHP Implementation Plans

Member and applicant respondents incur no costs because the Bank Advisory Councils prepare and the Banks and FHFA review Advisory Council reports and recommendations.

D. Comment Request

Written comments are requested on: (1) Whether the collection of information is necessary for the proper performance of FHFA functions, including whether the information has practical utility; (2) the accuracy of FHFA's estimates of the burdens of the collection of information; (3) ways to enhance the quality, utility and clarity of the information collected; and (4) ways to minimize the burden of the collection of information on applicants and housing associates, including through the use of automated collection techniques or other forms of information technology. Comments may be submitted in writing as instructed above in the *Comments* section.

Dated: December 2, 2009.

Edward J. De Marco,

Acting Director, Federal Housing Finance Agency.

[FR Doc. E9–29219 Filed 12–7–09; 8:45 am]

BILLING CODE P

FEDERAL RESERVE SYSTEM

Agency Information Collection Activities: Announcement of Board Approval Under Delegated Authority and Submission to OMB

SUMMARY: *Background.* Notice is hereby given of the final approval of proposed information collections by the Board of Governors of the Federal Reserve System (Board) under OMB delegated authority, as per 5 CFR 1320.16 (OMB Regulations on Controlling Paperwork Burdens on the Public). Board-approved collections of information are incorporated into the official OMB inventory of currently approved collections of information. Copies of the Paperwork Reduction Act Submission, supporting statements and approved collection of information instrument(s) are placed into OMB's public docket files. The Federal Reserve may not conduct or sponsor, and the respondent is not required to respond to, an information collection that has been extended, revised, or implemented on or after October 1, 1995, unless it displays a currently valid OMB control number.

FOR FURTHER INFORMATION CONTACT: Federal Reserve Board Clearance Officer —Michelle Shore—Division of Research and Statistics, Board of Governors of the Federal Reserve System, Washington, DC 20551 (202–452–3829).

OMB Desk Officer—Shagufta Ahmed —Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10235, Washington, DC 20503.

Final approval under OMB delegated authority of the extension for three years, without revision, of the following information collections:

(1) *Report title:* Disclosure and Reporting Requirements of CRA-Related Agreements.

Agency form number: Reg G.

OMB control number: 7100–0299.

Frequency: On occasion and annual.

Reporters: Insured depository institutions (IDIs) and nongovernmental entities or persons (NGEPs).

Annual reporting hours: 78 hours.

Number of respondents: 3 IDI and 6 NGEPs.

Estimated average hours per response: 1 hour (6 disclosure requirements and 1 annual report) and 4 hours (2 annual reports).

General description of report: This information collection is required pursuant the Federal Deposit Insurance Act (FDI Act), 12 U.S.C. 1831y(b) and (c). The FDI Act authorizes the Federal Reserve to require the disclosure and reporting requirements of Regulation G (12 CFR part 207). In general, the Federal Reserve does not consider individual respondent commercial and financial information collected by the Federal Reserve pursuant to Regulation G as confidential. However, a respondent may request confidential treatment pursuant to section (b)(4) of Freedom of Information Act, 5 U.S.C 552(b)(4).

Abstract: Section 48 of the FDI Act imposes disclosure and reporting requirements on IDIs, their affiliates and NGEPs that enter into written agreements that meet certain criteria. The written agreements must (1) be made in fulfillment of the Community Reinvestment Act of 1977 (CRA) and (2) involve funds or other resources of an IDI or affiliate with an aggregate value of more than $10,000 in a year, or loans with an aggregate principal value of more than $50,000 in a year. Section 48 excludes from the disclosure and reporting requirements any agreement between an IDI or its affiliate and an NGEP if the NGEP has not contacted the IDI or its affiliate, or a banking agency, concerning the CRA performance of the IDI.

Regulation G contains four disclosure requirements and two reporting requirements for IDIs and affiliates and

two disclosure requirements and one reporting requirement for NGEPs. Please see the agency's OMB supporting statement for a summary of the disclosure and reporting requirements of Regulation G, *http://www.federalreserve.gov/boarddocs/reportforms/review.cfm.*

The disclosure and reporting requirements in connection with Regulation G are mandatory and apply to state member banks and their subsidiaries; bank holding companies; affiliates of bank holding companies, other than banks, savings associations, and subsidiaries of banks and savings associations; and NGEPs that enter into covered agreements with any of the aforementioned companies.

Current Actions: On September 21, 2009, the Federal Reserve published a notice in the **Federal Register** (74 FR 48070) requesting public comment for 60 days on the extension, without revision, of Reg G. The comment period for this notice expired on November 20, 2009. The Federal Reserve did not receive any comments.

(2) *Report title:* Disclosure Requirements in Connection With Regulation H (Consumer Protections in Sales of Insurance).

Agency form number: Reg H–7.

OMB control number: 7100–0298.

Frequency: On occasion.

Reporters: State member banks.

Annual reporting hours: 13,451 hours.

Number of respondents: 854.

Estimated average hours per response: 1.5 minutes.

General description of report: This information collection is mandatory pursuant the Federal Deposit Insurance Act, 12 U.S.C. 1831x. Since the Federal Reserve does not collect any information, no issue of confidentiality normally arises.

Abstract: Section 305 of the Gramm-Leach-Bliley Act requires financial institutions to provide written and oral disclosures to consumers in connection with the initial sale of an insurance product or annuity concerning its uninsured nature and the existence of the investment risk, if appropriate, and the fact that insurance sales and credit may not be tied.

Covered persons must make insurance disclosures before the completion of the initial sale of an insurance product or annuity to a consumer. The disclosure must be made orally and in writing to the consumer that: (1) The insurance product or annuity is not a deposit or other obligation of, or guaranteed by, the financial institution or an affiliate of the financial institution; (2) the insurance product or annuity is not insured by the Federal Deposit Insurance Corporation or any other agency of the United States, the financial institution, or (if applicable) an affiliate of the financial institution; and (3) in the case of an insurance product or annuity that involves an investment risk, there is investment risk associated with the product, including the possible loss of value.

Covered persons must make a credit disclosure at the time a consumer applies for an extension of credit in connection with which an insurance product or annuity is solicited, offered, or sold. The disclosure must be made orally and in writing that the financial institution may not condition an extension of credit on either: (1) The consumer's purchase of an insurance product or annuity from the financial institution or any of its affiliates; or (2) the consumer's agreement not to obtain, or a prohibition on the consumer from obtaining, an insurance product or annuity from an unaffiliated entity.

Please see the agency's OMB supporting statement for a summary of the disclosure requirements of Regulation H–7. *http://www.federalreserve.gov/boarddocs/reportforms/review.cfm.*

Current Actions: On September 21, 2009, the Federal Reserve published a notice in the **Federal Register** (74 FR 48070) requesting public comment for 60 days on the extension, without revision, of Reg H–7. The comment period for this notice expired on November 20, 2009. The Federal Reserve did not receive any comments.

(3) *Report title:* Domestic Branch Notification.

Agency form number: FR 4001.

OMB Control number: 7100–0097.

Frequency: On occasion.

Reporters: State member banks (SMBs).

Annual reporting hours: 810 hours.

Estimated average hours per response: 30 minutes for expedited notifications and 1 hour for nonexpedited notifications.

Number of respondents: 159 expedited and 730 nonexpedited.

General description of report: This information collection is mandatory per Section 9(3) of the Federal Reserve Act (12 U.S.C. 321) and is not given confidential treatment.

Abstract: The Federal Reserve Act and Regulation H require an SMB to seek prior approval of the Federal Reserve System before establishing or acquiring a domestic branch. Such requests for approval must be filed as notifications at the appropriate Reserve Bank for the SMB. Due to the limited information that an SMB generally has to provide for branch proposals, there is no formal reporting form for a domestic branch notification. An SMB is required to notify the Federal Reserve by letter of its intent to establish one or more new branches, and provide with the letter evidence that public notice of the proposed branch(es) has been published by the SMB in the appropriate newspaper(s). The Federal Reserve uses the information provided to fulfill its statutory obligation to review any public comment on proposed branches before acting on the proposals, and otherwise to supervise SMBs.

Please see the agency's FR 4001 OMB supporting statement for a summary of the notification requirements. *http://www.federalreserve.gov/boarddocs/reportforms/review.cfm.*

Current Actions: On September 25, 2009, the Federal Reserve published a notice in the **Federal Register** (74 FR 48960) requesting public comment for 60 days on the extension, without revision, of the FR 4001. The comment period for this notice expired on November 24, 2009. No comments were received.

Final approval under OMB delegated authority of the extension for three years, with revision, of the following report:

Report title: Consolidated Bank Holding Company Report of Equity Investments in Nonfinancial Companies, and the Annual Report of Merchant Banking Investments Held for an Extended Period.

Agency form number: FR Y–12 and FR Y–12A, respectively.

OMB control number: 7100–0300.

Frequency: FR Y–12, quarterly and semiannually; and FR Y–12A, annually.

Reporters: Bank holding companies (BHCs) and financial holding companies (FHCs).

Estimated annual reporting hours: FR Y–12, 1,485 hours; and FR Y–12A, 91 hours.

Estimated average hours per response: FR Y–12, 16.5 hours; and FR Y–12A, 7 hours.

Number of respondents: FR Y–12, 26; and FR Y–12A, 13.

General description of report: This collection of information is mandatory pursuant to Section 5(c) of the Bank Holding Company Act (12 U.S.C. 1844(c)). The FR Y–12 data are not considered confidential. However, bank holding companies may request confidential treatment for any information that they believe is subject to an exemption from disclosure under the Freedom of Information Act (FOIA), 5 U.S.C. 552(b). The FR Y–12A data are considered confidential on the basis that disclosure of specific commercial or financial data relating to investments

held for extended periods of time could result in substantial harm to the competitive position of the financial holding company pursuant to the FOIA (5 U.S.C. 552(b)(4) and (b)(8)).

Abstract: The FR Y–12 collects information from certain domestic BHCs on their equity investments in nonfinancial companies. Respondents report the FR Y–12 either quarterly or semi-annually based on reporting threshold criteria. The FR Y–12A is filed annually by institutions that hold merchant banking investments that are approaching the end of the holding period permissible under Regulation Y.

Please see the agency's FR Y–12 OMB supporting statement for a summary of the proposed reporting requirements and draft reporting form and instructions. *http://www.federalreserve.gov/boarddocs/reportforms/review.cfm.*

Current Actions: On September 25, 2009, the Federal Reserve published a notice in the **Federal Register** (74 FR 48960) requesting public comment for 60 days on the extension, with revision, of the FR Y–12. The comment period for this notice expired on November 24, 2009. No comments were received.

Board of Governors of the Federal Reserve System, December 3, 2009.

Jennifer J. Johnson,

Secretary of the Board.

[FR Doc. E9–29184 Filed 12–7–09; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Sunshine Act Meeting

AGENCY HOLDING THE MEETING: Board of Governors of the Federal Reserve System.

TIME AND DATE: 12 p.m., Monday, December 14, 2009.

PLACE: Marriner S. Eccles Federal Reserve Board Building, 20th and C Streets, N.W., Washington, D.C. 20551.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

1. Personnel actions (appointments, promotions, assignments, reassignments, and salary actions) involving individual Federal Reserve System employees.

2. Any items carried forward from a previously announced meeting.

FOR FURTHER INFORMATION CONTACT: Michelle Smith, Director, or Dave Skidmore, Assistant to the Board, Office of Board Members at 202–452–2955.

SUPPLEMENTARY INFORMATION: You may call 202–452–3206 beginning at approximately 5 p.m. two business days before the meeting for a recorded announcement of bank and bank holding company applications scheduled for the meeting; or you may contact the Board's Web site at *http://www.federalreserve.gov* for an electronic announcement that not only lists applications, but also indicates procedural and other information about the meeting.

Board of Governors of the Federal Reserve System, December 4, 2009.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. E9–29320 Filed 12–4–09; 4:15 pm]

BILLING CODE 6210–01–S

FEDERAL TRADE COMMISSION

[File No. 061 0139]

Watson Pharmaceuticals, Inc. and Andrx Corporation; Analysis of Agreement Containing Consent Orders to Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed Consent Agreement.

SUMMARY: The consent agreement in this matter settles alleged violations of federal law prohibiting unfair or deceptive acts or practices or unfair methods of competition. The attached Analysis to Aid Public Comment describes both the allegations in the draft complaint and the terms of the consent order — embodied in the consent agreement — that would settle these allegations.

DATES: Comments must be received on or before January 4, 2010.

ADDRESSES: Interested parties are invited to submit written comments electronically or in paper form. Comments should refer to ''Watson Arrow, File No. 061 0139'' to facilitate the organization of comments. Please note that your comment — including your name and your state — will be placed on the public record of this proceeding, including on the publicly accessible FTC website, at (*http://www.ftc.gov/os/publiccomments.shtm*).

Because comments will be made public, they should not include any sensitive personal information, such as an individual's Social Security Number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. Comments also should not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, comments should not include any ''[t]rade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential. . . .,'' as provided in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and Commission Rule 4.10(a)(2), 16 CFR 4.10(a)(2). Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled ''Confidential,'' and must comply with FTC Rule 4.9(c), 16 CFR 4.9(c).[1]

Because paper mail addressed to the FTC is subject to delay due to heightened security screening, please consider submitting your comments in electronic form. Comments filed in electronic form should be submitted by using the following weblink: (*https://public.commentworks.com/ftc/watsonarrow*) and following the instructions on the web-based form. To ensure that the Commission considers an electronic comment, you must file it on the web-based form at the weblink: (*https://public.commentworks.com/ftc/watsonarrow*). If this Notice appears at (*http://www.regulations.gov/search/index.jsp*), you may also file an electronic comment through that website. The Commission will consider all comments that regulations.gov forwards to it. You may also visit the FTC website at (*http://www.ftc.gov/*) to read the Notice and the news release describing it.

A comment filed in paper form should include the ''Watson Arrow, File No. 061 0139'' reference both in the text and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission, Office of the Secretary, Room H-135 (Annex D), 600 Pennsylvania Avenue, NW, Washington, DC 20580. The FTC is requesting that any comment filed in paper form be sent by courier or overnight service, if possible, because U.S. postal mail in the Washington area and at the Commission is subject to delay due to heightened security precautions.

The Federal Trade Commission Act (''FTC Act'') and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives, whether filed in paper or electronic

[1]The comment must be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. The request will be granted or denied by the Commission's General Counsel, consistent with applicable law and the public interest. *See* FTC Rule 4.9(c), 16 CFR 4.9(c).

form. Comments received will be available to the public on the FTC website, to the extent practicable, at (*http://www.ftc.gov/os/publiccomments.shtm*). As a matter of discretion, the Commission makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the FTC website. More information, including routine uses permitted by the Privacy Act, may be found in the FTC's privacy policy, at (*http://www.ftc.gov/ftc/privacy.shtm*).

FOR FURTHER INFORMATION CONTACT: Stephanie C. Bovee (202-326-2083), Bureau of Competition, 600 Pennsylvania Avenue, NW, Washington, D.C. 20580.

SUPPLEMENTARY INFORMATION: Pursuant to section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46(f), and § 2.34 the Commission Rules of Practice, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement, and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Home Page (for October 6, 2009), on the World Wide Web, at (*http://www.ftc.gov/os/actions.shtm*). A paper copy can be obtained from the FTC Public Reference Room, Room 130-H, 600 Pennsylvania Avenue, NW, Washington, D.C. 20580, either in person or by calling (202) 326-2222.

Public comments are invited, and may be filed with the Commission in either paper or electronic form. All comments should be filed as prescribed in the **ADDRESSES** section above, and must be received on or before the date specified in the **DATES** section.

Analysis of Agreement Containing Consent Order to Aid Public Comment

The Federal Trade Commission (''Commission'') has accepted, subject to final approval, an Agreement Containing Consent Orders (''Consent Agreement'') from Watson Pharmaceuticals, Inc. (''Watson'') and Andrx Corporation (''Andrx''), which is designed to remedy the anticompetitive effects of the acquisition of Andrx by Watson. Under the terms of the proposed Consent Agreement, the companies would be required to: (1) terminate Watson's marketing agreement with Interpharm Holdings, Inc. (''Interpharm'') and return all of the Watson rights and assets necessary to market generic hydrocodone bitartrate/ibuprofen tablets back to Interpharm; (2) assign and divest the Andrx rights and assets necessary to develop, manufacture, and market generic extended release glipizide (''glipizide ER'') tablets to Actavis Elizabeth LLC, a subsidiary of The Actavis Group hf. (''Actavis''); and (3) divest the Andrx rights and assets necessary to develop, manufacture, and market the eleven generic oral contraceptive products to Teva Pharmaceutical Industries, Inc. (''Teva'').

The proposed Consent Agreement has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the proposed Consent Agreement and the comments received, and will decide whether it should withdraw from the proposed Consent Agreement, modify it, or make final the Decision and Order (''Order'').

Pursuant to an Agreement and Plan of Merger dated March 12, 2006, Watson proposes to acquire all of the outstanding shares of Andrx at a cost of $25.00 per share. The Commission's Complaint alleges that the proposed acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by lessening competition in the U.S. markets for the manufacture and sale of the following generic pharmaceutical products: (1) hydrocodone bitartrate/ibuprofen tablets; (2) glipizide ER tablets; and (3) eleven oral contraceptive products (the ''Products''). The proposed Consent Agreement will remedy the alleged violations by replacing the lost competition that would result from the acquisition in each of these markets.

The Products and Structure of the Markets

The proposed acquisition of Andrx by Watson would strengthen Watson's position in generic pharmaceuticals and provide Watson with a stronger pipeline of generic products. The companies overlap in a number of generic pharmaceutical markets, and if consummated, the transaction likely would lead to anticompetitive effects in thirteen of these markets, including eleven oral contraceptive markets.

The transaction would reduce the number of competing generic suppliers in the overlap markets. The number of generic suppliers has a direct and substantial effect on generic pricing as each additional generic supplier can have a competitive impact on the market. Because there are multiple generic equivalents for each of the products at issue here, the branded versions no longer significantly constrain the generics' pricing.

For four generic products, Watson and Andrx currently are two of a small number of suppliers offering the product. In each of these markets, there are a limited number of competitors. In nine additional oral contraceptive product markets, both Watson and Andrx have generic products either on the market or in development. Furthermore, there are few firms that are capable of, and interested in, entering these markets. As a result, the proposed acquisition would eliminate important future competition in these markets.

Hydrocodone bitartrate/ibuprofen is a combination of an opioid analgesic agent, hydrocodone bitartrate, and a nonsteroidal anti-inflammatory drug (''NSAID''), ibuprofen and is the generic version of Abbott Laboratories Inc.'s Vicoprofen. Generic hydrocodone bitartrate/ibuprofen tablets are used for the short-term management of acute pain and have been available in the United States since 2003. In 2005, sales of generic hydrocodone bitartrate/ibuprofen exceeded $62 million. Only three companies compete in the generic hydrocodone bitartrate/ibuprofen market: Watson, Andrx, and Teva. An additional company is in the process of obtaining FDA approval and expects to enter the market once the approval is granted, which is likely to occur in the next two years. Teva is the market leader with approximately 62 percent of the market. Andrx and Watson account for the rest of the market with about 27 percent and 12 percent market share, respectively. After Watson's acquisition of Andrx, Watson's market share would increase from 12 percent to approximately 39 percent, and Teva would be the only remaining competitor to Watson.

Glipizide ER is the generic version of Pfizer's Glucotrol XL. Glipizide ER corrects the effects of type 2 diabetes by stimulating the release of insulin in the pancreas, thereby reducing blood sugar levels in the body. Generic glipizide ER was first introduced in the United States in November 2003. In 2005, sales of generic glipizide ER totaled approximately $174 million. Watson is the leading supplier in the U.S. market for generic glipizide ER tablets with over 45 percent of the market. Only two other firms, Andrx and Greenstone Ltd.

(''Greenstone''), compete with Watson in this market. Andrx and Greenstone have market shares of about 35 percent and 20 percent, respectively. Post-acquisition, Watson's market share would increase to over 80 percent, and Greenstone would be the only other remaining U.S. supplier of generic glipizide ER.

Oral contraceptives are pills taken by mouth to prevent ovulation and pregnancy. They are the most common method of reversible birth control, used by up to 82 percent of women in the United States at some time during their reproductive years. Oral contraceptives contain various formulations of synthetic estrogen and progestin, which are chemical analogues of natural female hormones. Andrx and Teva have an agreement whereby Andrx develops and manufactures these oral contraceptives and Teva markets the products. Andrx also receives a royalty payment on Teva's sales of the products. In each of the eleven relevant oral contraceptive markets, Watson and Andrx/Teva are two of a limited number of suppliers or potential entrants.

Two of the oral contraceptive products at issue are currently marketed formulations of generic norgestimate/ethinyl estradiol bioequivalent to the branded products, Ortho-Cyclen and Ortho Tri-Cyclen, from Johnson & Johnson. Both products have varying ratios of norgestimate (a progestin) and ethinyl estradiol (an estrogen) that prevent ovulation and pregnancy. Generic formulations of Ortho-Cyclen and Ortho Tri-Cyclen are among the best selling generic oral contraceptives, representing sales of over $58 million and $261 million, respectively, in 2005.

Watson, Andrx/Teva, and Barr Pharmaceuticals, Inc. (''Barr'') are the only suppliers of generic Ortho-Cyclen and generic Ortho Tri-Cyclen in the United States. After the acquisition, the combined Watson/Andrx would account for 28 percent of the generic Ortho-Cyclen market. Watson is the leading supplier in the U.S. market for the manufacture and sale of generic Ortho Tri-Cyclen tablets. After the acquisition, Watson would account for 56 percent of the market.

Watson currently competes in seven additional oral contraceptive markets where Andrx/Teva is developing competitive products. These seven markets represent generic products that are equivalent to Ortho-cept, Triphasil 28, Alesse, Ortho-Novum 1/35, Ortho-Novum 7/7/7, Loestrin FE (1 mg/0.020 mg), and Loestrin FE (1.5 mg/0.030 mg). In each of these highly concentrated markets, Watson is one of only two or three suppliers. Andrx/Teva is one of a limited number of firms developing generic oral contraceptives that would compete in each of these markets, and is well-positioned to enter the markets in a timely manner.

Both Watson and Andrx/Teva are developing generic Mircette tablets and generic Ovcon-35 tablets. They are two of a limited number of suppliers capable of entering these future generic markets in a timely manner.

Entry

Entry into the markets for the manufacture and sale of the Products would not be timely, likely or sufficient in its magnitude, character, and scope to deter or counteract the anticompetitive effects of the acquisition. Developing and obtaining Food and Drug Administration (''FDA'') approval for the manufacture and sale of the Products takes at least two (2) years due to substantial regulatory, technological, and intellectual property barriers.

Effects

The proposed acquisition would cause significant anticompetitive harm to consumers in the U.S. markets for the manufacture and sale of generic hydrocodone bitartrate/ibuprofen tablets, generic glipizide ER tablets, generic Ortho-Cyclen tablets, and generic Ortho Tri-Cyclen tablets. In generic pharmaceutical markets, pricing is heavily influenced by the number of competitors that participate in a given market. Here, the evidence shows that the price of the generic pharmaceutical product at issue decreases with the entry of each additional competitor. The proposed transaction would eliminate one of at most four competitors in these markets. Evidence gathered during our investigation indicates that anticompetitive effects – whether unilateral or coordinated – are likely to result from a decrease in the number of independent competitors in the markets at issue.

In the markets for generic hydrocodone bitartrate/ibuprofen and generic glipizide ER, the acquisition of Andrx by Watson would leave only two current competitors: the combined firm and one other company. The evidence indicates that the presence of three independent competitors in these markets allows customers to negotiate lower prices, and that a reduction in the number of competitors would allow the merged entity and other market participants to raise prices. Likewise, in the generic oral contraceptive markets, the reduction in the number of competitors from three to two would likely lead to higher prices.

The competitive concerns can be characterized as both unilateral and coordinated in nature. The homogenous nature of the products involved, the minimal incentives to deviate, and the relatively predictable prospects of gaining new business all indicate that the firms in the market will find it profitable to coordinate their pricing. The impact that a reduction in the number of firms would have on pricing can also be explained in terms of unilateral effects, as the likelihood that the merging parties would be the first and second choices in a significant number of bidding situations is enhanced where the number of firms participating in the market decreases substantially.

The acquisition also would cause significant anticompetitive harm to consumers in the U.S. markets for the manufacture and sale of generic Ortho-Cept tablets, generic Triphasil 28 tablets, generic Alesse tablets, generic OrthoNovum 1/35 tablets, generic OrthoNovum 7/7/7 tablets, generic Loestrin FE (1 mg/0.020 mg) tablets, and generic Loestrin FE (1.5 mg/0.030 mg) tablets, generic Mircette tablets and generic Ovcon-35 tablets by eliminating future competition between Watson and Andrx. In each of these markets, there are no more than three current suppliers, and Andrx is poised to enter in the near future. Andrx's independent entry into these markets likely would result in lower prices. The proposed transaction would eliminate that independent entry and, hence, would leave prices at their current, higher levels.

The Consent Agreement

The proposed Consent Agreement effectively remedies the proposed acquisition's anticompetitive effects in the relevant product markets. Pursuant to the Consent Agreement, Watson and Andrx are required to divest certain rights and assets related to the relevant products to a Commission-approved acquirer no later than ten (10) days after the acquisition. Specifically, the proposed Consent Agreement requires that: (1) Watson terminate its marketing agreement with Interpharm, thereby returning all of its rights to generic hydrocodone bitartrate/ibuprofen back to Interpharm; (2) Andrx divest its rights and assets to generic glipizide ER to Actavis, including assigning its supply agreement with Pfizer, Inc.; and (3) Andrx divest its rights and assets related to the eleven generic oral contraceptives to Teva, and supply Teva with the products for five years in order for Teva (or its designated contract manufacturer) to obtain all necessary FDA approvals to

manufacture and sell the products independently.

The acquirers of the divested assets must receive the prior approval of the Commission. The Commission's goal in evaluating possible purchasers of divested assets is to maintain the competitive environment that existed prior to the acquisition. A proposed acquirer of divested assets must not itself present competitive problems.

Interpharm specializes in the development, manufacture, and marketing of generic pharmaceutical and over-the-counter products. Interpharm currently manufactures and markets 23 generic pharmaceutical products, and has ten ANDAs under review by the FDA. As a contract manufacturer for Watson's product, Interpharm is an acceptable acquirer of generic hydrocodone bitartrate/ibuprofen because it already has the experience, know-how, and manufacturing infrastructure to produce and sell generic hydrocodone bitartrate/ibuprofen in the United States. Interpharm understands the scientific and technical details of generic hydrocodone bitartrate/ibuprofen because it formulated, developed, and tested the product, and registered the product with the FDA. Moreover, Interpharm will not present competitive problems in any of the markets in which it will acquire a divested asset because it currently does not compete in those markets. With its resources, capabilities, good reputation, and experience marketing generic products, Interpharm is well-positioned to replicate the competition that would be lost with the proposed acquisition.

Actavis is a leading developer, manufacturer, marketer, and distributer of generic pharmaceutical products, and is an acceptable acquirer of generic glipizide ER. Actavis has an extensive distribution network in the United States, with three major manufacturing facilities and approximately 162 pharmaceutical products in the U.S. market. Actavis also has experience obtaining FDA approvals for generic pharmaceutical products. While Actavis currently does not compete in the market for the divested assets, it has the resources, capabilities, good reputation, and experience necessary to restore fully the competition that would be lost if the proposed Watson/Andrx transaction were to proceed unremedied.

Teva is a global pharmaceutical company specializing in the development, production, and marketing of generic and branded pharmaceuticals. Founded in 1901 and headquartered in Petach Tikva, Israel, Teva employs approximately 25,000 people worldwide and has production facilities in Israel, North America, Europe, and Mexico. Teva and its affiliates are the world's largest generic pharmaceutical company with over 300 generic products, representing $6.6 billion in estimated 2006 revenue. Because of its current agreement with Andrx, and its well-known reputation and experience in the pharmaceutical industry, Teva is ideally positioned to be a viable, independent competitor in the eleven generic oral contraceptive markets. The acquisition of the eleven generic oral contraceptive products by Teva would effectively restore the competition that would be lost with the proposed merger.

If the Commission determines that either Interpharm or Actavis is not an acceptable acquirer of the assets to be divested, or that the manner of the divestitures to Interpharm, Actavis, or Teva is not acceptable, the parties must unwind the sale and divest the Products within six (6) months of the date the Order becomes final to another Commission-approved acquirer. If the parties fail to divest within six (6) months, the Commission may appoint a trustee to divest the Product assets.

The proposed remedy contains several provisions to ensure that the divestitures are successful. The Order requires Watson and Andrx to provide transitional services to enable the Commission-approved acquirers to obtain all of the necessary approvals from the FDA. These transitional services include technology transfer assistance to manufacture the Products in substantially the same manner and quality employed or achieved by Watson and Andrx.

The Commission has appointed Francis J. Civille as the Interim Monitor to oversee the asset transfer and to ensure Watson and Andrx's compliance with all of the provisions of the proposed Consent Agreement. Mr. Civille has over 27 years of experience in the pharmaceutical industry. He is a highly-qualified expert in areas such as pharmaceutical research and development, regulatory approval, manufacturing and supply, and marketing. He has provided consulting services in healthcare business development to major pharmaceutical companies, biotechnology companies, universities, and government agencies. In order to ensure that the Commission remains informed about the status of the proposed divestitures and the transfers of assets, the proposed Consent Agreement requires Watson and Andrx to file reports with the Commission periodically until the divestitures and transfers are accomplished.

The purpose of this analysis is to facilitate public comment on the proposed Consent Agreement, and it is not intended to constitute an official interpretation of the proposed Order or to modify its terms in any way.

By direction of the Commission, with Commissioner Harbour recused.

Donald S. Clark

Secretary.

[FR Doc. E9–29251 Filed 12–7–09: 7:54 am]

BILLING CODE 6750–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Implementation of Section 5001 of the American Recovery and Reinvestment Act of 2009 for Adjustments to the Third and Fourth Quarters of Fiscal Year 2009 Federal Medical Assistance Percentage Rates for Federal Matching Shares for Medicaid and Title IV–E Foster Care, Adoption Assistance and Guardianship Assistance Programs

AGENCY: Office of the Secretary, DHHS.

ACTION: Notice

SUMMARY: This notice finalizes the methodology for calculating the higher Federal matching funding that is made available under Section 5001 of the American Recovery and Reinvestment Act of 2009 (ARRA), and provides the final calculation of the adjusted Federal Medical Assistance Percentage (FMAP) rates for the third and fourth quarters of Fiscal Year 2009 (FY09). Section 5001 of the ARRA provides for temporary increases in the FMAP rates to provide fiscal relief to States and to protect and maintain State Medicaid and certain other assistance programs in a period of economic downturn. The increased FMAP rates apply during a recession adjustment period that is defined as the period beginning October 1, 2008 and ending December 31, 2010.

DATES: *Effective Date:* The percentages listed are for the third quarter of FY09 beginning April 1, 2009 and ending June 30, 2009 and for the fourth quarter of FY09 beginning July 1, 2009 and ending September 30, 2009.

A. Background

The FMAP is used to determine the amount of Federal matching for specified State expenditures for assistance payments under programs under the Social Security Act. Sections 1905(b) and 1101(a)(8)(B) of the Social Security Act (''the Act'') require the Secretary of Health and Human Services

to publish the FMAP rates each year. The Secretary calculates the percentages using formulas set forth in sections 1905(b) and 1101(a)(8)(B), and from the Department of Commerce's statistics of average income per person in each State and for the nation as a whole. The percentages must be within the upper and lower limits given in section 1905(b) of the Act. The percentages to be applied to the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Northern Mariana Islands are specified separately in the Act, and thus are not based on the statutory formula that determines the percentages for the 50 States.

Section 1905(b) of the Act specifies the formula for calculating FMAP as follows:

> The FMAP for any State shall be 100 per centum less the State percentage; and the State percentage shall be that percentage which bears the same ratio to 45 per centum as the square of the per capita income of such State bears to the square of the per capita income of the continental United States (including Alaska) and Hawaii; except that (1) the FMAP shall in no case be less than 50 per centum or more than 83 per centum, and (2) the FMAP for Puerto Rico, the Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa shall be 50 per centum.

Section 4725 of the Balanced Budget Act of 1997 amended section 1905(b) to provide that the FMAP for the District of Columbia for purposes of titles XIX (Medicaid) and XXI (CHIP) shall be 70 percent. The Medicare Improvements for Patients and Providers Act of 2008 (Pub. L. 110–275) amended the FMAP applied to the District of Columbia for maintenance payments under title IV–E programs to make it consistent with the 70 percent Medicaid match rate.

Section 5001 of Division B of the ARRA provides for a temporary increase in FMAP rates for Medicaid and title IV–E Foster Care, Adoption Assistance and Guardianship Assistance programs. The purposes of the increases to the FMAP rates are to provide fiscal relief to States and to protect and maintain State Medicaid and certain other assistance programs in a period of economic downturn, referred to as the ''recession adjustment period.'' The recession adjustment period is defined as the period beginning October 1, 2008 and ending December 31, 2010.

On August 4, 2009, we published a notice with a comment period that described the methodology for calculating the increased Federal matching funding made available under ARRA. (74 FR 38630.) In this issuance, we consider the single comment we received on that prior notice, and set forth the final methodology and FMAP rates for the third and fourth quarters of Federal fiscal year 2009.

B. Calculation of the Increased FMAP Rates Under ARRA

Section 5001 of the ARRA specifies that the FMAP rates shall be temporarily increased for the following: (1) Maintenance of FMAP rates for FY09, FY10, and first quarter of FY11, so that the FMAP rate will not decrease from the prior year, determined by using as the FMAP rate for the current year the greater of any prior fiscal year FMAP rates between 2008–2010 or the rate calculated for the current fiscal year; (2) in addition to any maintenance increase, the application of an increase in each State's FMAP of 6.2 percentage points; and (3) an additional percentage point increase based on the State's increase in unemployment during the recession adjustment period. The resulting increased FMAP cannot exceed 100 percent. Each State's FMAP will be recalculated each fiscal quarter beginning October 2008. Availability of certain components of the increased FMAP is conditioned on States meeting statutory programmatic requirements, such as the maintenance of effort requirement, which are not part of the calculation process.

Expenditures for which the increased FMAP is not available under title XIX include expenditures for disproportionate share hospital payments, certain eligibility expansions, services received through an IHS or Tribal facility (which are already paid at a rate of 100 percent and therefore not subject to increase), and expenditures that are paid at an enhanced FMAP rate. The increased FMAP is available for expenditures under part E of title IV (including Foster Care, Adoption Assistance and Guardianship Assistance programs) only to the extent of a maintenance increase (hold harmless), if any, and the 6.2 percentage point increase. The increased FMAP does not apply to part D of title IV–E (Child Support Enforcement Program).

For title XIX purposes only, for each qualifying State with an unemployment rate that has increased at a rate above the statutory threshold percentage, ARRA provides additional relief above the general 6.2 percentage point increase in FMAP through application of a separate increase calculation. For those States, the FMAP for each qualifying State is increased by the number of percentage points equal to the product of the State matching percentage (as calculated under section 1905(b) and adjusted if necessary for the maintenance of FMAP without reduction from the prior year, and after applying half of the 6.2 percentage point general increase in the Federal percentage) and the applicable percent determined from the State unemployment increase percentage for the quarter.

The unemployment increase percentage for a calendar quarter is equal to the number of percentage points (if any) by which the average monthly unemployment rate for the State in the most recent previous 3-consecutive-month period for which data are available exceeds the lowest average monthly unemployment rate for the State for any 3-consecutive-month period beginning on or after January 1, 2006. A State qualifies for additional relief based on an increase in unemployment if that State's unemployment increase percentage is at least 1.5 percentage points.

The applicable percent is: (1) 5.5 percent if the State unemployment increase percentage is at least 1.5 percentage points but less than 2.5 percentage points; (2) 8.5 percent if the State unemployment increase percentage is at least 2.5 percentage points but less than 3.5 percentage points; and (3) 11.5 percent if the State unemployment increase percentage is at least 3.5 percentage points.

If the State's applicable percent is less than the applicable percent for the preceding quarter, then the higher applicable percent shall continue in effect for any calendar quarter beginning on January 1, 2009 and ending before July 1, 2010.

Puerto Rico, the Virgin Islands, Guam, the Commonwealth of the Northern Mariana Islands, and America Samoa can make a one-time election between (1) a 30 percent increase in their cap on Medicaid payments (as determined under subsections (f) and (g) of section 1108 of the Social Security Act), or (2) applying the increase of 6.2 percentage points in the FMAP plus a 15 percent increase in the cap on Medicaid payments. There is no quarterly unemployment adjustment for Territories. As a result, we are not addressing the Territories or Commonwealth in this document, and will instead work with them separately and individually.

C. Response to Public Comments on Methodology

Only one comment was received in response to the request for public comments on the methodology set forth in the August 4, 2009 Notice. The commenter supported the methodology set forth in the August 4, 2009 Notice for the calculation of the ARRA increased FMAP. In light of the absence

of any issues raised through public comment, the methodology for calculating the adjusted FMAPs will remain as it was set forth in the August 4, 2009 Notice.

D. Adjusted FMAPs for the Third and Fourth Quarters of 2009

ARRA adjustments to FMAPs are shown by State in the accompanying table. The hold harmless FY09 FMAP is the higher of the original FY08 or FY09 FMAP. The 6.2 percentage point increase is added to the hold harmless FY09 FMAP. The unemployment tier is determined by comparing the average unemployment rate for the three consecutive months preceding the start of each fiscal quarter to the lowest consecutive 3-month average unemployment rate beginning January 1, 2006. The unemployment adjustment is calculated according to the unemployment tier and added to the hold harmless FY09 FMAP with the 6.2 percentage point increase.

FOR FURTHER INFORMATION CONTACT: Carrie Shelton or Thomas Musco, Office of Health Policy, Office of the Assistant Secretary for Planning and Evaluation, Room 447D—Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201, (202) 690–6870.

(Catalog of Federal Domestic Assistance Program Nos. 93.558: TANF Contingency Funds; 93.563: Child Support Enforcement; 93–596: Child Care Mandatory and Matching Funds of the Child Care and Development Fund; 93.658: Foster Care; 93.659: Adoption Assistance; 93.090: Guardianship Assistance; 93.769: Ticket-to-Work and Work Incentives Improvement Act)

Dated: November 20, 2009.

Kathleen Sebelius,

Secretary.

ARRA ADJUSTMENTS TO FMAP Q3 & Q4 FY09

State	FY08 original FMAP	FY09 original FMAP	Hold harmless FY09	Hold harmless FY09 FMAP with 6.2%pt increase	1st & 2nd Quarter FY09 FMAP unemployment adjustment	3rd Quarter FY09 FMAP unemployment adjustment	3-month average unemployment ending June 2009	Minimum unemployment	Unemployment difference	Unemployment tier	Unemployment adjustment Q4 FY09	4th Quarter FY09 FMAP unemployment adjustment
Alabama	67.62	67.98	67.98	74.18	76.64	77.51	9.6	3.3	6.3	11.5	3.33	77.51
Alaska	52.48	50.53	52.48	58.68	58.68	61.12	8.2	6.0	2.2	5.5	2.44	61.12
Arizona	66.20	65.77	66.20	72.40	75.01	75.93	8.2	3.6	4.6	11.5	3.53	75.93
Arkansas	72.94	72.81	72.94	79.14	79.14	80.46	6.9	4.8	2.1	5.5	1.32	80.46
California	50.00	50.00	50.00	56.20	61.59	61.59	11.4	4.8	6.6	11.5	5.39	61.59
Colorado	50.00	50.00	50.00	56.20	58.78	61.59	7.5	3.6	3.9	11.5	5.39	61.59
Connecticut	50.00	50.00	50.00	56.20	60.19	60.19	7.8	4.3	3.5	11.5	5.39	61.59
Delaware	50.00	50.00	50.00	56.20	60.19	61.59	8.0	3.3	4.7	11.5	5.39	61.59
District of Columbia	70.00	70.00	70.00	76.20	77.68	79.29	10.5	5.4	5.1	11.5	3.09	79.29
Florida	56.83	55.40	56.83	63.03	67.64	67.64	10.2	3.3	6.9	11.5	4.61	67.64
Georgia	63.10	64.49	64.49	70.69	73.44	74.42	9.6	4.3	5.3	11.5	3.73	74.42
Hawaii	56.50	55.11	56.50	62.70	66.13	67.35	7.2	2.2	5.0	11.5	4.65	67.35
Idaho	69.87	69.77	69.87	76.07	78.37	79.18	7.7	2.8	4.9	11.5	3.11	79.18
Illinois	50.00	50.32	50.32	56.52	60.48	61.88	9.9	4.4	5.5	11.5	5.36	61.88
Indiana	62.69	64.26	64.26	70.46	73.23	74.21	10.4	4.4	6.0	11.5	3.75	74.21
Iowa	61.73	62.62	62.62	68.82	68.82	68.82	5.6	3.7	1.9	5.5	1.89	70.71
Kansas	59.43	60.08	60.08	66.28	66.28	68.31	6.8	4.0	2.8	8.5	3.13	69.41
Kentucky	69.78	70.13	70.13	76.33	77.80	79.41	10.5	5.4	5.1	11.5	3.08	79.41
Louisiana	72.47	71.31	72.47	78.67	80.01	80.01	6.5	3.5	3.0	8.5	2.08	80.75
Maine	63.31	64.41	64.41	70.61	72.40	74.35	8.3	4.4	3.9	11.5	3.74	74.35
Maryland	50.00	50.00	50.00	56.20	58.78	60.19	7.1	3.4	3.7	11.5	5.39	61.59
Massachusetts	50.00	50.00	50.00	56.20	58.78	60.19	8.3	4.4	3.9	11.5	5.39	61.59
Michigan	58.10	60.27	60.27	66.47	69.58	70.68	14.1	6.7	7.4	11.5	4.21	70.68
Minnesota	50.00	50.00	50.00	56.20	60.19	61.59	8.2	3.9	4.3	11.5	5.39	61.59
Mississippi	76.29	75.84	76.29	82.49	83.62	84.24	9.3	6.0	3.3	8.5	1.75	84.24
Missouri	62.42	63.19	63.19	69.39	71.24	73.27	8.8	4.7	4.1	11.5	3.88	73.27
Montana	68.53	68.04	68.53	74.73	76.29	77.14	6.2	3.2	3.0	8.5	2.41	77.14
Nebraska	58.02	59.54	59.54	65.74	65.74	67.79	4.8	2.8	2.0	5.5	2.05	67.79
Nevada	52.64	50.00	52.64	58.84	63.93	63.93	11.3	4.2	7.1	11.5	5.09	63.93
New Hampshire	50.00	50.00	50.00	56.20	56.20	58.78	6.6	3.4	3.2	8.5	3.99	60.19
New Jersey	50.00	50.00	50.00	56.20	58.78	61.59	8.8	4.2	4.6	11.5	5.39	61.59
New Mexico	71.04	70.88	71.04	77.24	77.24	78.66	6.4	3.5	2.9	8.5	2.20	79.44
New York	50.00	50.00	50.00	56.20	58.78	60.19	8.2	4.3	3.9	11.5	5.39	61.59
North Carolina	64.05	64.60	64.60	70.80	73.55	74.51	10.9	4.5	6.4	11.5	3.71	74.51
North Dakota	63.75	63.15	63.75	69.95	69.95	69.95	4.2	3.0	1.2	0	0.00	69.95
Ohio	60.79	62.14	62.14	68.34	70.25	72.34	10.7	5.3	5.4	11.5	4.00	72.34
Oklahoma	67.10	65.90	67.10	73.30	74.94	74.94	6.3	3.3	3.0	8.5	2.53	75.83
Oregon	60.86	62.45	62.45	68.65	71.58	72.61	12.0	5.0	7.0	11.5	3.96	72.61
Pennsylvania	54.08	54.52	54.52	60.72	63.05	64.32	8.1	4.3	3.8	11.5	4.87	65.59
Rhode Island	52.51	52.59	52.59	58.79	63.89	63.89	11.9	4.8	7.1	11.5	5.10	63.89
South Carolina	69.79	70.07	70.07	76.27	78.55	79.36	11.8	5.5	6.3	11.5	3.09	79.36
South Dakota	60.03	62.55	62.55	68.75	68.75	70.64	5.0	2.7	2.3	5.5	1.89	70.64
Tennessee	63.71	64.28	64.28	70.48	73.25	74.23	10.5	4.5	6.0	11.5	3.75	74.23
Texas	60.56	59.44	60.56	66.76	68.76	68.76	7.1	4.4	2.7	8.5	3.09	69.85
Utah	71.63	70.71	71.63	77.83	77.83	79.98	5.4	2.5	2.9	8.5	2.15	79.98
Vermont	59.03	59.45	59.45	65.65	67.71	69.96	7.3	3.5	3.8	11.5	4.31	69.96
Virginia	50.00	50.00	50.00	56.20	58.78	61.59	7.0	2.8	4.2	11.5	5.39	61.59
Washington	51.52	50.94	51.52	57.72	60.22	62.94	9.1	4.4	4.7	11.5	5.22	62.94
West Virginia	74.25	73.73	74.25	80.45	80.45	81.70	8.4	4.2	4.2	11.5	2.60	83.05
Wisconsin	57.62	59.38	59.38	65.58	65.58	68.77	8.8	4.4	4.4	11.5	4.31	69.89
Wyoming	50.00	50.00	50.00	56.20	56.20	56.20	5.2	2.8	2.4	5.5	2.58	58.78

[FR Doc. E9–29248 Filed 12–7–09; 8:45 am]
BILLING CODE 4210–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Toxicology Program (NTP); Center for the Evaluation of Risks to Human Reproduction (CERHR); Announcement of the Soy Formula Expert Panel Meeting: Amended Notice

AGENCY: National Institute of Environmental Health Sciences (NIEHS), National Institutes of Health (NIH).

ACTION: Availability of telephone conferencing and extension of registration period.

SUMMARY: The CERHR announces the availability of a teleconference line to allow presentation of oral comments at the expert panel meeting on December 16–18, 2009, at the Hilton Alexandria Old Town, 1767 King Street, Alexandria, VA. Information regarding the soy formula expert panel meeting was announced in the **Federal Register** (74 FR 53508) published on October 19, 2009, and is available on the CERHR Web site (*http://cerhr.niehs.nih.gov*). The guidelines and deadlines published in this **Federal Register** notice still apply, except that the deadline for registering to attend or to present oral comments by telephone is now December 11, 2009.

DATES: The expert panel meeting for soy formula will be held on December 16–18, 2009, and convene each day at 8:30 a.m. EST. Persons wishing to attend are asked to register by December 11, 2009, via the CERHR Web site (*http://cerhr.niehs.nih.gov*). Time is set-aside at the expert panel meeting on December 16, 2009, for oral public comments. Individuals wishing to make oral public comments are asked to register online (*http://cerhr.niehs.nih.gov*) or contact Dr. Kristina A. Thayer, CERHR Acting Director, by December 11, 2009, and if possible, send a copy of the statement at that time.

ADDRESSES: The meeting will be held at the Hilton Alexandria Old Town, 1767 King Street, Alexandria, VA. Access to on-line registration to either attend the meeting in person or participate by teleconference line is available on the CERHR Web site (*http://cerhr.niehs.nih.gov*). Public comments and any other correspondence should be submitted to Dr. Kristina A. Thayer, CERHR Acting Director, NIEHS, P.O. Box 12233, Mail Drop K2–04, Research Triangle Park, NC 27709 (mail), 919–541–5021 (telephone), or *thayer@niehs.nih.gov* (e-mail). Courier address: NIEHS, 530 Davis Drive, Room K2154, Morrisville, NC 27560.

FOR FURTHER INFORMATION CONTACT: Dr. Kristina A. Thayer (telephone: 919–541–5021 or e-mail: *thayer@niehs.nih.gov*).

SUPPLEMENTARY INFORMATION:

Teleconferencing

To allow greater public participation at the soy formula expert panel meeting, the NTP will provide a teleconference line to access the public comment session of the meeting. The NTP has reserved a limited number of telephone lines for this call and access availability will be on a first-come, first-served basis. Individuals interested in participating in the meeting by teleconference line must register by December 11, 2009. Those registering to present oral comments by telephone will be provided the access number prior to the meeting. The formal public comment period is scheduled for December 16, 2009, at approximately 9 a.m. until 10 a.m. EST. Oral public comments should not exceed 7 minutes in length and each organization is allowed only one comment slot (in person or by telephone). Every effort will be made to accommodate the public, but the total time allotted for oral comments and the time allotted per speaker by telephone will depend on the number of people who register online to speak. In addition, teleconference participants are encouraged to send a copy of their oral statement or talking points, which can supplement and/or expand the oral presentation, for distribution at the meeting and for the meeting record.

Dated: December 1, 2009.

John R. Bucher,

Associate Director, National Toxicology Program.

[FR Doc. E9–29249 Filed 12–7–09; 8:45 am]
BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Government-Owned Inventions; Availability for Licensing

AGENCY: National Institutes of Health, Public Health Service, HHS.

ACTION: Notice.

SUMMARY: The inventions listed below are owned by an agency of the U.S. Government and are available for licensing in the U.S. in accordance with 35 U.S.C. 207 to achieve expeditious commercialization of results of federally-funded research and development. Foreign patent applications are filed on selected inventions to extend market coverage for companies and may also be available for licensing.

ADDRESSES: Licensing information and copies of the U.S. patent applications listed below may be obtained by writing to the indicated licensing contact at the Office of Technology Transfer, National Institutes of Health, 6011 Executive Boulevard, Suite 325, Rockville, Maryland 20852–3804; telephone: 301/496–7057; fax: 301/402–0220. A signed Confidential Disclosure Agreement will be required to receive copies of the patent applications.

Human Renal Cell Carcinoma (RCC) Cell Lines Derived From Surgically Removed Tumors

Description of Technology: Scientists at the National Institutes of Health (NIH) have developed three cell lines obtained from renal cell carcinoma (RCC) patients. The cell lines, designated 1581 RCC, 1764 RCC, and 2194 RCC, were derived from human tumor samples surgically resected from patients in the inventors' clinic. Each cell line is human leukocyte antigen-A2 (HLA–A2) negative and expresses a variety of known tumor antigens. The 1764 RCC cell line is known to express the HLA–A3 antigen and high levels of nonmutated fibroblast growth factor 5 (FGF–5). These cell lines can be widely used in molecular biology for various assays and to screen for potential therapeutics with activity against RCC. The RCC cell lines can also serve as negative control samples for HLA–A2 expression.

Applications:

- Research tools for examining the common and diverse biological and pathological features of RCC from different patients *in vitro.*
- Research tools for testing the activity of potential anti-cancer drugs against RCC.
- Source for mRNA and protein antigens expressed in kidney cancer.
- Negative control cell lines for HLA–A2 expression in molecular biology.
- Possible starting material for developing a cancer vaccine against RCC.

Advantages:

- *Cell lines are derived directly from RCC patient samples:* These cell lines are anticipated to retain many features of primary RCC samples. Studies performed using these cell lines may have a direct correlation to the initiation, progression, treatment, and prevention of RCC in humans.

• *Do not express the HLA–A2 allele:* A majority of the cancer vaccines and immunotherapies developed to date have focused on utilizing HLA–A2 restricted tumor epitopes since this HLA allele is largely expressed in the human population. However, therapies restricted to HLA–A2 recognition will not be successful in RCC patients that do not express this allele. For these RCC patients, additional therapies are needed that are directed against epitopes presented by different HLA alleles.

Inventors: Ken-ichi Hanada, Qiong J. Wang, James C. Yang (NCI).

Related Publication: K Hanada *et al.* Identification of fibroblast growth factor-5 as an overexpressed antigen in multiple human adenocarcinomas. Cancer Res. 2001 Jul 15;61(14):5511–5516.

Patent Status: HHS Reference No. E–005–2010/0—Research Tool. Patent protection is not being pursued for this technology.

Licensing Status: Available for licensing under a Biological Materials License Agreement.

Licensing Contact: Samuel E. Bish, Ph.D.; 301–435–5282; bishse@mail.nih.gov.

Small-Molecule Inhibitors of Angiogenesis

Description of Technology: Angiogenesis, the growth of new blood vessels from existing vessels, is a normal and vital process in growth and development. Deregulation of angiogenesis plays a role in many human diseases, including cancer, age-related macular degeneration, diabetic retinopathy, and endometriosis.

NCI investigators have used a cell-based high-throughput screening method to identify a set of anti-angiogenic small molecules. These compounds are highly active, inhibiting both endothelial cell growth and tube formation, and are not cytotoxic. Structure-activity relationship analysis has revealed that these compounds are unrelated to known anti-angiogenic compounds, and hence may operate through a novel mechanism of action. Thus, these compounds would be promising candidates for the development of new anti-angiogenesis therapeutics.

Applications: Development of new anti-angiogenesis therapeutics.

Advantages: These compounds are structurally unrelated to other known anti-angiogenesis compounds, and exhibit high activity without cytotoxicity.

Development Status: In vivo studies using xenograft models are underway.

Inventors: Enrique Zudaire Ubani *et al.* (NCI).

Publication: In preparation.

Patent Status: HHS Reference No. E–263–2009/0—U.S. Provisional Application No. 61/230,667 filed 31 Jul 2009.

Related Technology: HHS Reference No. E–281–2007/0—Multicolored Fluorescent Cell Lines for High-Throughput Angiogenesis and Cytotoxicity Screening.

Licensing Status: Available for licensing.

Licensing Contact: Tara Kirby, Ph.D.; 301–435–4426; *tarak@mail.nih.gov.*

Collaborative Research Opportunity: The National Cancer Institute Angiogenesis Core Facility is seeking statements of capability or interest from parties interested in collaborative research to further develop, evaluate, or commercialize a new set of non-cytotoxic antiangiogenic small molecules. Please contact John D. Hewes, Ph.D. at 301–435–3121 or *hewesj@mail.nih.gov* for more information.

Identification of Colorectal Cancer Biomarkers by Serum Protein Profiling

Description of Technology: This invention describes serum features that distinguish colorectal carcinoma malignant patient samples versus healthy samples using surface-enhanced laser desorption ionization time-of-flight (SELDI–TOF) mass spectrometry. By comparing healthy versus malignant samples, the investigators were able to identify thirteen (13) serum features that have been validated using an independently collected, blinded validation set of 55 sera samples. The features are characterized by the mass to charge ratio (m/z ratio). The investigators have shown that SELDI–TOF based serum marker protein profiling enables minimally invasive detection of colon cancer with 96.7 percent sensitivity and 100 percent specificity.

Colorectal cancer is the third most common cancer and the third leading cause of cancer-related mortality in the United States. Current diagnostic methods for colorectal cancer have a large non-compliance rate because of discomfort, *e.g.,* sigmoidoscopy or colonoscopy, or have a high rate of false positive results, *e.g.,* fecal occult blood tests. The claimed invention has the potential to be a widely used, easy-to-use, and inexpensive diagnostic.

Inventors: Thomas Ried and Jens Habermann (NCI).

Patent Status: U.S. Patent Application No. 11/886,886 filed 21 Sep 2007 (HHS Reference No. E–106–2005/0–US–03).

Licensing Status: Available for licensing.

Licensing Contact: Surekha Vathyam, Ph.D.; 301–435–4076; *vathyams@mail.nih.gov.*

Dated: December 2, 2009.

Richard U. Rodriguez,

Director, Division of Technology Development and Transfer, Office of Technology Transfer, National Institutes of Health.

[FR Doc. E9–29250 Filed 12–7–09; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2009–N–0664]

Oncologic Drugs Advisory Committee; Amendment of Notice

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

The Food and Drug Administration (FDA) is announcing an amendment to the notice of a meeting of the Oncologic Drugs Advisory Committee. This meeting was announced in the **Federal Register** of November 17, 2009 (74 FR 59195). The amendment is being made to reflect a change in the *Date and Time*, *Agenda*, and *Procedure* portions of the document. We also are cancelling a session regarding supplemental new drug application (sNDA) 022–059/S–007, TYKERB (lapatinib) tablets, by SmithKline Beecham Ltd. d/b/a GlaxoSmithKline. This portion of the meeting has been cancelled because the issues for which FDA was seeking the scientific input of the Committee have been resolved.

FOR FURTHER INFORMATION CONTACT: Nicole Vesely, Center for Drug Evaluation and Research (HFD–21), Food and Drug Administration, 5600 Fishers Lane, (for express delivery, 5630 Fishers Lane, rm. 1093), Rockville, MD 20857, 301–827–6793, FAX: 301–827–6776, e-mail: *nicole.vesely@fda.hhs.gov*, or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington DC area), code 3014512542. Please call the Information Line for up-to-date information on this meeting.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of November 17, 2009 (74 FR 59195), FDA announced that a meeting of the Oncologic Drugs Advisory Committee would be held on December 16, 2009. On page 59195, in the first column, the *Date and Time* portion of the document is changed to read as follows:

Date and Time: The meeting will be held on December 16, 2009, from 9 a.m. to 3 p.m.

On page 59195, in the second column, the *Agenda* portion of the document is changed to read as follows:

Agenda: On December 16, 2009, the committee will discuss supplemental new drug application (sNDA) 021–743/S–016, TARCEVA (erlotinib) tablets, by OSI Pharmaceuticals, Inc. The proposed indication (use) for this product is first-line maintenance, monotherapy (first-choice, single drug) treatment in patients with a form of lung cancer called non-small cell lung cancer (NSCLC) that is either locally advanced (has spread regionally within the lung and/or within chest lymph nodes) or metastatic (has spread beyond the lung), and who have not progressed (including those patients with stable disease) on first-line treatment with platinum-based chemotherapy (a regimen including a platinum drug (cisplatin or carboplatin) plus another chemotherapy drug).

On page 59195, in the third column, the third sentence in the *Procedure* portion of the document is changed to read as follows:

Procedure: Oral presentations from the public will be scheduled between approximately 1 p.m. to 2 p.m.

This notice is issued under the Federal Advisory Committee Act (5 U.S.C. app. 2) and 21 CFR part 14, relating to the advisory committees.

Dated: December 3, 2009.

David Horowitz,

Assistant Commissioner for Policy.

[FR Doc. E9–29208 Filed 12–7–09; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2009–N–0664]

Anesthetic and Life Support Drugs Advisory Committee; Notice of Meeting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

This notice announces a forthcoming meeting of a public advisory committee of the Food and Drug Administration (FDA). The meeting will be open to the public.

Name of Committee: Anesthetic and Life Support Drugs Advisory Committee.

General Function of the Committee: To provide advice and recommendations to the agency on FDA's regulatory issues.

Date and Time: The meeting will be held on January 28, 2010, from 8 a.m. to 4:30 p.m.

Location: Hilton Washington DC North/Gaithersburg, The Ballrooms, 620 Perry Pkwy., Gaithersburg, MD. The hotel telephone number is 301–977–8900.

Contact Person: Kalyani Bhatt, Center for Drug Evaluation and Research (HFD–21), Food and Drug Administration, 5600 Fishers Lane (for express delivery, 5630 Fishers Lane, rm. 1093), Rockville, MD 20857, 301–827–7001, FAX: 301–827–6776, e-mail: *Kalyani.Bhatt@fda.hhs.gov*, or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in Washington, DC area), code 3014512529. Please call the Information Line for up-to-date information on this meeting. A notice in the **Federal Register** about last minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice. Therefore, you should always check the agency's Web site and call the appropriate advisory committee hotline/phone line to learn about possible modifications before coming to the meeting.

Agenda: On January 28, 2010, the committee will discuss the available safety and efficacy data for new drug application (NDA) 22516, CYMBALTA (duloxetine HCL) Capsules, by Eli Lilly and Co., as they relate to the proposed indication of treatment of chronic pain.

FDA intends to make background material available to the public no later than 2 business days before the meeting. If FDA is unable to post the background material on its Web site prior to the meeting, the background material will be made publicly available at the location of the advisory committee meeting, and the background material will be posted on FDA's Web site after the meeting. Background material is available at *http://www.fda.gov/AdvisoryCommittees/Calendar/default.htm*. Scroll down to the appropriate advisory committee link.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person on or before January 13, 2010. Oral presentations from the public will be scheduled between approximately 1 p.m. and 1:30 p.m. Those desiring to make formal oral presentations should notify the contact person and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation on or before January 5, 2010. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than can be reasonably accommodated during the scheduled open public hearing session, FDA may conduct a lottery to determine the speakers for the scheduled open public hearing session. The contact person will notify interested persons regarding their request to speak by January 6, 2010.

Persons attending FDA's advisory committee meetings are advised that the agency is not responsible for providing access to electrical outlets.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Kalyani Bhatt at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our Web site at *http://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm111462.htm* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: December 3, 2009.

David Horowitz,

Assistant Commissioner for Policy.

[FR Doc. E9–29211 Filed 12–7–09; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel, Member Conflict: Inflammation, Hypersensitivity, Autoimmunity, Tolerance, and Transplantation and Tumor Immunity.

Date: December 15, 2009.

Time: 9:30 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Jian Wang, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4095D, MSC 7812, Bethesda, MD 20892, (301) 435–2778, *wangjia@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS).

Dated: December 2, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–29254 Filed 12–7–09; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center For Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Topics in Virology.

Date: January 6, 2010.

Time: 1 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Liangbiao Zheng, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3214, MSC 7808, Bethesda, MD 20892, 301–402–5671, *zhengli@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Clinical Cardiovascular Studies 09A.

Date: January 7, 2010.

Time: 2:30 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Joseph Thomas Peterson, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4118, MSC 7814, Bethesda, MD 20892, 301–443–8130.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS).

Dated: December 2, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–29252 Filed 12–7–09; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Indian Health Service

Office of Clinical and Preventive Services; Division of Behavioral Health; the Methamphetamine and Suicide Prevention Initiative for American Indian and Alaska Native Urban Programs

Announcement Type: New.

Funding Announcement Number: HHS–2010–IHS–METHU–0001.

Catalog of Federal Domestic Assistance Number(s): 93.933.

KEY DATES: *Application Deadline Date:* January 5, 2010. *Review Date:* January 12–13, 2010. *Earliest Anticipated Start Date:* February 1, 2010.

I. Funding Opportunity Description

The Indian Health Service (IHS) announces competitive grant applications for the Methamphetamine & Suicide Prevention Initiative (MSPI) for American Indian and Alaska Native (AI/AN) Urban Program communities. This program is authorized under the Snyder Act, 25 U.S.C. 13, as amended, and Indian Health Care Improvement Act (IHCIA), 25 U.S.C. 1653(e). This program is described at 93.933 in the Catalog of Federal Domestic Assistance. The purpose of the Methamphetamine & Suicide Prevention Initiative for AI/AN Urban Programs (MSPI–U) is to expand community-level access to effective, urban AI/AN methamphetamine and/or suicide prevention and treatment programs. Resources will enhance evidence-based or practice-based methamphetamine and/or suicide prevention or treatment programs and/or community mobilization programs. The methamphetamine and suicide prevention or treatment funding will be used to:

- Provide community-focused responses that enhance evidence-based or practice based methamphetamine and/or suicide prevention or treatment services or education programming.
- Coordinate services for communities to respond to their local methamphetamine and/or suicide crises.
- Participate in a nationally coordinated program focusing specifically on increasing access to methamphetamine and/or suicide prevention or treatment related activities among the Federal partners, Areas, Tribes, States, and academic or not-for-profit programs.
- Provide communities with needed resources to develop their own community-focused programs with preference for coordinated programming that maximizes the impact across communities and Tribal groups.
- Establish baseline data information related to methamphetamine abuse/suicides in the local communities.
- Adequately document the level of need for the community.
- Promote programs that will ensure measureable impact.
- Awardees' activities for this program are as follows:
- Develop a three (3) year action plan. Applicants must document how their methamphetamine and/or suicide prevention or treatment activities will be implemented as soon as possible but no later than six (6) months after award. The remainder of Year One, Year Two, and Year Three will focus on implementation. The primary intent of the action plan should be to illustrate how the applicant will enhance community access to or support community delivery of evidence-based or practice-based methamphetamine and/or suicide prevention or treatment services. The action plan should describe the project implementation process. The action plan should include objectives that are specific, measurable, achievable, relevant, and time-phased. Objectives should demonstrate adherence to the Government Performance and Results Act of 1993 (GPRA), where applicable. The implementation process may be guided

by a community action organization, collaboration, or a group of partners to plan and implement a community-wide methamphetamine and/or suicide prevention or treatment project. If such partnerships or collaborations are already in place, provide a description of how they intend to expand their scope to include the implementation of the methamphetamine and/or suicide prevention or treatment project. Relevant partnerships working closely with and developing collaborations for the MSPI–U may include smaller urban organizations which combine their resources to implement this project. ''Relevant partnerships'' can be defined as developing cooperative agreements and/or Memoranda of Agreement that clearly define how the collaboration will be conducted.

• Collaborations may also include other partners to share resources and information that could strengthen the program.

• The action plan should focus on developing or enhancing and implementing community-based, evidence or practice-based methamphetamine and/or suicide prevention or treatment strategies. The action plan for the community prevention or treatment program should include the proposed best and promising practices being implemented, identify information sharing processes, and define and identify interactive group activities, data collection (i.e. Resource and Patient Management System), evaluation, and ongoing quality assurance improvement processes. The project should include culturally appropriate behavioral, policy, and community approaches to methamphetamine and/or suicide prevention or treatment.

• Applicants must attend one (1) mandatory MSPI–U grantee meeting per year. The budget submitted should reflect travel costs for the project director and the local evaluator to attend this meeting. Location (city/hotel) and time frame for this meeting will be provided after award; however the meeting will generally last two to three days and attendance is mandatory. At these meetings, grantees will present the results of their projects and Federal staff will be available to provide technical assistance.

• Applicants must participate in a national evaluation of this project. Each grantee shall coordinate with their national MSPI project officer. The grantee shall work with the IHS staff and national MSPI project officer to develop a local process to measure specific outcome measures as consistent with national GPRA measures and IHS Division of Behavioral Health (DBH) program requirements.

• Up to a maximum of 20 percent of grant funds may be used to develop or enhance the grantee's local evaluation capacity for the purposes of meeting MSPI data collection requirements. All applicants will be required to employ the use of the Resource and Patient Management System (RPMS) and the RPMS behavioral health module or IHS Electronic Health Record. If the applicant is unable to utilize the RPMS as an information management system, the applicant should demonstrate within the application how they will satisfy the data collection requirements. Applicants will also be required to adhere to any and all GPRA requirements, where applicable.

• Other costs in conjunction with the evaluation of this project may include training (onsite and off-site), conference calls, and information sharing using e-mail and/or faxing materials.

• Applicants are expected to publicize their activities in the affected communities. The action plan may include:

• Identification of one to three environmental issues that community members have stated need to be addressed in order to promote the prevention and/or treatment of methamphetamine abuse and/or suicide. There should be some record that this has been identified as an issue that needs to be addressed. This may include local newspapers, Tribal Council meetings, Town Hall meetings, or radio programs.

• Community programs should inform their community about the program and its goals and the baseline data for the outcome indicators. The program should establish a time frame and setting to share their progress with the community. The settings could include regular programs on the radio station, monthly newspaper reports or newsletter mailings, or one or more graph or 'thermometer' type billboards or centrally placed posters that track progress.

• The action plan should include a community gathering that is held to close out the project with an accounting of the progress by indicators and dialogue about next steps.

II. Award Information

Type of Awards: Grant.

Estimated Funds Available: The total amount identified for fiscal year (FY) 2010 is $1,103,000; FY 2011 is $1,103,000; FY 2012 is $1,103,000. Grand total of $3,306,000. The duration of these awards are for 12 months in each budget period. All awards issued under this announcement are subject to the availability of these funds. In the absence of funding, the agency is not under any obligation to make awards selected for funding under this announcement.

Anticipated Number of Awards: IHS anticipates issuing five (5) awards under this announcement for FY 2010.

Project Period: Three (3) Years, and is subject to the availability of funds.

Award Amount: $220,600, per year.

III. Eligibility Information

1. Eligible Applicants

• *Urban Indian organizations* that operate a Title V Urban Indian Health Program: this includes programs currently under a grant or contract with the IHS under Title V of the IHCIA.

The ICHIA, 25 U.S.C. 1603(e) defines an urban Indian organization as a non-profit corporate body situated in an urban center governed by an urban Indian controlled board of directors, and providing for maximum participation of all interested Indian groups and individuals, which body is capable of legally cooperating with other public and private entities for the purposes of performing the activities described in section 1653(e).

Eligibility is limited to the aforementioned applicants because they have the necessary knowledge of, experience, and capability/capacity to work within the urban AI/AN communities to perform the required activities.

Applicants must provide a letter of support from the board of the urban Indian organization. If there is insufficient time to procure such a letter of support prior to submitting the application, the letter must be submitted within six months after award. Place this documentation behind the first page of your application form.

2. Cost Sharing or Matching

The MSPI does not require matching funds or cost sharing.

Other Requirements

A. If application budgets exceed the stated dollar amount that is outlined within this announcement, those applications will not be considered for funding.

B. The budget should include a budget narrative and justification for all cost outlined in the application for the budget period and should explain why each line item is necessary or relevant to the proposed project.

IV. Application and Submission Information

1. Applicant packages may be found at the Grants.gov Web site (*http://www.grants.gov*), or for a link to the package information go to the Grants Policy Staff Web site at *http://www.ihs.gov/NonMedicalPrograms/gogp/gogp_funding.asp*. Information regarding the electronic application process may be directed to Tammy G. Bagley, at (301) 443–5402. The entire application package and detailed application instructions are available at *http://www.grants.gov/index.jsp*.

2. Content and Form of Application Submission

a. You must submit a project narrative with your application package. The project narrative must be submitted in the following format:

- *Maximum number of pages:* 25. If your narrative exceeds the page limit, only the first pages which are within the page limit will be reviewed.
- *Font size:* 12 point unreduced.
- Single spaced.
- 8½″ x 11″ paper.
- *Page margin size:* One inch.

Your narrative should address activities to be conducted over the entire project period. You must use the sections/headings listed below in developing your project narrative. Be sure to place the required information in the correct section, or it will not be considered. Your application will be scored according to how well you address the requirements for each section of the project narrative. Your project narrative must include the following items in the order listed:

- Statement of Need.
- Describe the target population as well as the geographic area to be served, and justify the selection of both. Include the numbers to be served and demographic information. Discuss the target population's language, beliefs, norms and values, as well as socioeconomic factors that must be considered in services to this population.
- Show that identified needs are consistent with priorities of the Tribes, State, or county that has primary responsibility for the service delivery system.
- Describe the local resource organizations in the community.
- Project Plan.
- Clearly state the purpose, goals and objectives of your proposed project and how it addresses the target population and the geographic area being served.
- Describe how the project is to be implemented, including the roles of staff to be hired.
- Provide a realistic timeline for the project (chart or graph) showing key activities, milestones, and responsible staff. [**Note:** The timeline should be part of the project narrative. It should not be placed in an appendix.]
- If you plan to include an advisory body in your project, describe its membership, roles and functions, and frequency of meetings.
- Describe how members of the target population help prepare the application and how they will help plan, implement, and evaluate the project.
- Identify any other organizations that will participate in the proposed project. Describe their roles and responsibilities and demonstrate their commitment to the project. Include letters of commitment from community organizations supporting the project in the appendix.
- Show that the necessary groundwork (*e.g.*, planning, consensus development, development of memoranda of agreement) has been completed or is near completion so that the project can be implemented, and any prevention or treatment interventions can begin as soon as possible but no later than six (6) months after grant award.
- Describe any potential barriers to successful conduct of the proposed project and how you will overcome them.
- Describe your plan to ensure project sustainability when funding for this project ends. Also describe how program continuity will be maintained when there is a change in the operational environment (*e.g.*, staff turnover, change in project leadership) to ensure stability over time.
- Organizational Capacity.
- Discuss the capability and experience of the applicant organization and other participating organizations with the target population. Provide Memoranda of Understanding or Letters of Agreement specifically for the proposed project from participating organizations in the appendix.
- Describe existing community infrastructure that addresses transitional/discharge or aftercare treatment.
- Provide a list of staff and position descriptions for those who will participate in the project, showing the role of each and their level of effort and qualifications. Include the project director and other key personnel, such as the local evaluator and prevention or treatment personnel.
- Describe the cultural characteristics of key staff and indicate if any are members of the target population/community.
- Describe the resources available for the proposed project (*e.g.*, facilities, equipment), and provide evidence that services will be provided in a location that is adequate, accessible, compliant with the Americans with Disabilities Act (ADA), and amenable to the target population.
- Describe evidence of successful program management experience (*see* Criteria for more detail).
- Describe experience with other Federal, State, or private grants.
- Describe data collection experience and capacity for data storage. Clearly describe the project's information management system capabilities and history of its use (if any). Describe any plans to utilize the RPMS information management system with the implementation of this project. If applicant currently utilizes an alternate information management system or is unable to utilize RPMS as an information management system, the applicant should demonstrate within the application how they plan to satisfy the data collection requirements.
- Local Evaluation Capacity.
- Grantees must evaluate their projects and are required to describe their evaluation plans in their applications. The evaluation should be designed to provide regular feedback to the project to improve services. The evaluation must include both process and outcome components. Process and outcome evaluations must measure change relating to project goals and objectives over time compared to baseline information. Describe evaluation experience with current or past community projects.
- State willingness to work with IHS evaluation consultant(s) in developing community-specific outcome measures for the local and national evaluation.
- Demonstrate evidence of having secured or plans to secure a qualified local evaluation consultant and/or part-time employee to conduct data collection and data entry (*e.g.*, resume, position description).
- Describe plans for data collection, management, analysis, interpretation and reporting. Describe the existing approach to the collection of data, along with any necessary modifications. Be sure to include data collection instruments/interview protocols in an appendix format.
- Demonstrate how the evaluation will be integrated with requirements for collection and reporting of performance data (*e.g.* RPMS and GPRA indicators, performance measures). *Explain:* How you will ensure privacy and confidentiality? Where data will be stored? Who will or will not have access

to information and how the identity of participants will be kept private, for example, through the use of a coding system on data records, limiting access to records, or storing identifiers separately from data? Describe adequate consent procedures.

• Applicants must consider their evaluation plans when preparing the project budget. No more than 20% of the total grant award may be used for evaluation and data collection (this is not a research grant).

The evaluation must include both process and outcome components. Process and outcome evaluations must measure change relating to project goals and objectives over time compared to baseline information. Control or comparison groups are not required.

Process components should address issues such as:

• How closely did the implementation match the plan?

• What types of deviation from the plan occurred?

• What led to the deviations?

• What effect did the deviations have on the planned intervention and evaluation?

• Who (program, staff) provided what services (modality, type, intensity, duration), to whom (individual characteristics), in what context (system, community), and at what cost (facilities, personnel, dollars)?

Outcome components should address issues such as:

	FY 2009	FY 2010	FY 2011
Outcome measure # 1:			
The proportion of methamphetamine-using patients who enter a methamphetamine treatment program.	N/A	Baseline	Baseline.
Outcome measure # 2:			
Reduce the incidence of suicidal activities (ideation, attempts) in AI/AN communities through prevention, training, surveillance, & intervention programs.	N/A	Baseline	Baseline.
Outcome measure # 3:			
Reduce the incidence of methamphetamine abuse in AI/AN communities through prevention, training, surveillance, & intervention programs.	N/A	Baseline	Baseline.
Outcome measure # 4:			
The proportion of youth who participate in evidence-based and/or promising practice prevention or intervention programs.	N/A	Baseline	Baseline.
Output measures # 5:			
Establishment of trained suicide crisis response teams	N/A	Baseline	Baseline.
Output measure # 6:			
Increase tele-behavioral health encounters	N/A	Baseline	Baseline.

• Budget Justification (will not be counted in the stated page limit). You must provide a narrative justification of the items included in your proposed budget, as well as a description of existing resources and other support you expect to receive for the proposed project. Be sure to show that no more than 20% of the total grant award will be used for data collection and evaluation.

Additional information shall be included in the application appendices. The appendices will not be counted toward the narrative page limit. This additional information includes:

• Position descriptions for key personnel including local evaluator and data collection/data entry employees. If the evaluator will be subcontracted, include a letter of commitment with a current biographical sketch from the individual(s). Job descriptions should be no longer than one page each.

• Curriculum Vitae/Resume of key personnel (project director, evaluator (if identified)). Resumes should be no longer than two (2) pages in length.

• Applicants must provide a letter of support from the board of the urban Indian organization.

You are required to have a Dun and Bradstreet Data Universal Numbering System (DUNS) number to apply for a grant or cooperative agreement from the Federal government. The DUNS number is a nine-digit identification number, which uniquely identifies business entities. Obtaining a DUNS number is easy and there is no charge. To obtain a DUNS number, access *http://www.dunandbradstreet.com* or call (866) 705–5711. For more information, see the IHS Web site at: *http://www.ihs.gov/od/pgo/funding/pubcommt.htm*.

If your application form does not have a DUNS number field, please write your DUNS number at the top of the first page of your application, and/or include your DUNS number in your application cover letter.

3. Submission Dates and Times

Applications must be submitted electronically through Grants.gov by 12 midnight Eastern Standard Time (E.S.T.) on the application deadline due date. If technical challenges arise and the applicant is unable to successfully complete the electronic application process, the applicant should contact Grants Policy Staff at (301) 443–5402 at least fifteen days prior to the application deadline and advise of the difficulties that your organization is experiencing. The grantee must obtain prior approval, in writing (e-mails are acceptable) allowing the paper submission. If submission of a paper application is requested and approved, the original and two copies may be sent to the Division of Grants Operations (DGO), 801 Thompson Avenue, TMP, Suite 360, Rockville, MD 20852, (301) 443–5204 by 12 midnight E.S.T. on the application deadline date. Applications not submitted through Grants.gov, without an approved waiver, may be returned to the applicant without review or consideration. Late applications will not be accepted for processing. They will be returned to the applicant and will not be considered for funding.

4. Intergovernmental Review

Executive Order 12372 requiring intergovernmental review is not applicable to this program.

5. Funding Restrictions

• Pre-award costs are allowable pending prior approval from the awarding agency. However, in accordance with 45 CFR Part 74 all pre-award costs are incurred at the recipient's risk. The awarding office is under no obligation to reimburse such costs if for any reason the applicant does not receive an award or if the award to the recipient is less than anticipated.

• The available funds are inclusive of direct and appropriate indirect costs.

• IHS will not acknowledge receipt of applications.

6. Other Submission Requirements

Electronic Submission—The preferred method for receipt of applications is electronic submission through Grants.gov. However, should any technical challenges arise regarding the submission, please contact Grants.gov Customer Support at (800) 518–4726 or *support@grants.gov*. The Contact Center hours of operation are 24 hours a day, 7 days a week. It is closed on all Federal holidays. The applicant must seek assistance at least fifteen days prior to the application deadline. Applicants that do not adhere to the timelines for Central Contractor Registry (CCR) and/or Grants.gov registration and/or requesting timely assistance with technical issues will not be a candidate for paper applications.

To submit an application electronically, please use the *http://www.Grants.gov* and select ''Apply for Grants'' link on the home page. Download a copy of the application package on the Grants.gov Web site, complete it offline and then upload and submit the application via the Grants.gov site. You may not e-mail an electronic copy of a grant application to IHS.

Please be reminded of the following:

- Under the new IHS application submission requirements, paper applications are not the preferred method. However, if you have technical problems submitting your application online, please contact Grants.gov Customer Support at: *http://www.grants.gov/CustomerSupport*.
- Upon contacting Grants.gov, obtain a tracking number as proof of contact. The tracking number is helpful if there are technical issues that cannot be resolved and a waiver request from Grants Policy must be obtained.
- If it is determined that a formal waiver is necessary, the applicant must submit a request, in writing (e-mails are acceptable), to *Michelle.Bulls@ihs.gov* that includes a justification for the need to deviate from the standard electronic submission process. Upon receipt of approval, a hard copy application package must be downloaded by the applicant from Grants.gov, and sent directly to the DGO, 801 Thompson Avenue, TMP, Suite 360, Rockville, MD 20852 on or before 12 midnight of the application deadline date.
- Upon entering the Grants.gov site, there is information available that outlines the requirements to the applicant regarding electronic submission of an application through Grants.gov, as well as the hours of operation. We strongly encourage all applicants not to wait until the deadline date to begin the application process through Grants.gov as the registration process for CCR and Grants.gov could take up to fifteen working days.
- To use Grants.gov, you, as the applicant, must have a DUNS Number and register in the CCR. You should allow a minimum of ten days working days to complete CCR registration. See below for more information on how to apply.
- You must submit all documents electronically, including all information typically included on the SF–424 and all necessary assurances and certifications.
- Please use the optional attachment feature in Grants.gov to attach additional documentation that may be requested by IHS.
- Your application must comply with any page limitation requirements described in the program announcement.
- After you electronically submit your application, you will receive an automatic acknowledgment from Grants.gov that contains a Grants.gov tracking number. The DGO will download your application from Grants.gov and provide necessary copies to the program office. The DGO will not notify applicants that the application has been received.
- You may access the electronic application for this program on *http://www.Grants.gov*.
- You may search for the downloadable application package using either the CFDA number or the Funding Opportunity Number. Both numbers are identified in the heading of this announcement.
- The applicant must provide the Funding Opportunity Number: HHS–2010–IHS–METHU–0001.

E-mail applications will not be accepted under this announcement.

DUNS Number

Applicants are required to have a DUNS number to apply for a grant or cooperative agreement from the Federal Government. The DUNS number is a nine-digit identification number, which uniquely identifies business entities. Obtaining a DUNS number is easy and there is no charge. To obtain a DUNS number, access *http://www.dunandbradstreet.com* or call (866) 705–5711. Interested parties may wish to obtain their DUNS number by phone to expedite the process.

Applications submitted electronically must also be registered with the CCR. A DUNS number is required before CCR registration can be completed. Many organizations may already have a DUNS number. Please use the number listed above to investigate whether or not your organization has a DUNS number. Registration with the CCR is free of charge.

Applicants may register by calling (888) 227–2423. Please review and complete the CCR Registration Worksheet located on *http://www.grants.gov/CCRRegister*.

More detailed information regarding these registration processes can be found at *http://www.grants.gov*.

V. Application Review Information

1. Criteria

Applicants are required to provide measures of effectiveness that will demonstrate the accomplishment of the various identified objectives of the cooperative agreement. Measures of effectiveness must relate to the performance goals stated in the ''Purpose'' section of this announcement. Measures must be objective, qualitative and quantitative, and must measure the intended process and outcome. These measures of effectiveness must be submitted with the application and will be an element of evaluation.

Your application will be evaluated against the following criteria:

Project Plan (30) Points

- Comprehensively describe the proposed three (3) year project—5 points.
- Comprehensively describe the project's objectives and activities—5 Points.
- Include a timeline of activities. Is the timeline provided comprehensive—5 Points.
- Comprehensively describe and identify potential problem areas or barriers and propose solutions—5 Points.
- Provide community focused responses that enhance evidence-based or practice-based methamphetamine and/or suicide prevention or treatment services or education programming—5 Points.
- Provide communities with needed resources to develop their own community-focused programs with preference for coordinated programming that maximizes the impact across communities and Tribal groups—5 Points.

Statement of Need (15) Points

- Provide an adequate baseline picture of the community—5 Points.
- Provide a good description and justification for the identified project target population—10 points.

Organizational Capacity (20) Points

- Describe the community infrastructure addressing methamphetamine and/or suicide treatment or prevention—10 Points.
- Comprehensively provide evidence of successful methamphetamine and/or suicide program management capability—5 Points.
- Adequately describe the project staffing, their expected tasks/roles, experience and training, and time commitment—5 Points.

Local Evaluation Capacity (25) Points

- Address applicable outcomes/output measures and how they relate to stated activities and objectives—10 Points.
- State a willingness to collaborate and submit data into the MSPI national evaluation process—2 Points.
- Demonstrate evidence of commitment to securing a qualified local evaluation/data collection/entry capacity. Provide documentation—5 Points.
- Demonstrate how the program will use a portion of awarded funds (not to exceed 20 percent) to develop or enhance funding recipients' local evaluation capacity—2 Points.
- Describe how the funding recipients will establish baseline data and information related to methamphetamine abuse/suicides in the local communities—2 Points.
- Demonstrate how the data collection and storage capacity adequately supports the program. If data collected is non-RPMS based, does the proposal describe how such data will be submitted to IHS/HQ—2 Points.
- Describe the local evaluation process in sufficient detail—2 Points.

National Evaluation Plan Capacity (10) Points

- State a willingness to participate in a nationally coordinated program focusing on increasing access to methamphetamine and/or suicide prevention or treatment related activities—5 Points.
- State a willingness to attend a minimum of one mandatory MSPI meeting per fiscal year—2 Points.
- State a willingness to participate in monthly/quarterly MSPI awardees conferences—3 Points.

2. Review and Selection Process

Each application will be reviewed by the DGO for eligibility, compliance with the announcement, and completeness. Incomplete applications and applications that are non-responsive to the eligibility criteria will not advance through the review process. Applicants will be notified that their application did not meet submission requirements.

Applications that meet eligibility requirements, are complete, and conform to this announcement will be subject to the competitive objective review and evaluation by an Ad Hoc Review Committee of Tribal, IHS, and other Federal or non-Federal reviewers. Applications will be reviewed against criteria. Reviewers will assign a numerical score to each application which will be used to rank applications. The review process will be directed by the DGO staff to ensure compliance with the Department of Health and Human Services (HHS) and IHS grant review guidelines.

In addition, the following factors may affect the funding decision:

- Geographic diversity.

IHS will provide justification for any decision to fund out of rank order.

3. Anticipated Announcement and Award Dates

Awards may start on February 1, 2010.

VI. Award Administration Information

1. Award Notices

The Notice of Award (NoA) will be initiated by the DGO and will be mailed via postal mail to each entity that is approved for funding under this announcement. The NoA will be signed by the Grants Management Officer, and this is the authorizing document for which funds are dispersed to the approved entities. The NoA will serve as the official notification of the grant award and will reflect the amount of Federal funds awarded, the purpose of the grant, the terms and conditions of the award, the effective date of the award, and the budget/project period. The NoA is the legally binding document. Applicants who are approved but unfunded or disapproved based on their Objective Review score will receive a copy of the Executive Summary which identifies the weaknesses and strengths of the application submitted.

2. Administrative and National Policy Requirements

Grants are administrated in accordance with the following documents:

- This Program Announcement.
- 45 CFR Part 92, ''Uniform Administrative Requirements for Grants and Cooperative Agreements to State, Local and Tribal Governments,'' or 45 CFR Part 74, ''Uniform Administrative Requirements for Awards to Institutions of Higher Education, Hospitals, Other Nonprofit Organizations, and Commercial Organizations.''
- HHS Grants Policy Statement, January 2007.
- OMB Circular A–87, ''State, Local, and Indian Tribal Governments,'' (Title 2 Part 225) or OMB Circular A–122, ''Non-Profit Organizations'' (Title 2 Part 230).
- OMB Circular A–133, ''Audits of States, Local Governments, and Non-Profit Organizations'' (Title 2 Part 30)

3. Indirect-Cost Requirements

This section applies to all grant recipients that request reimbursement of indirect costs in their grant application. In accordance with HHS Grants Policy Statement, Part II–27, IHS requires applicants to have a current indirect cost rate agreement in place prior to award. The rate agreement must be prepared in accordance with the applicable cost principles and guidance as provided by the agency or office. A current rate means the rate covering the applicable activities and the award budget period. If the current rate is not on file with the DGO at the time of award, the indirect cost portion of the budget will be restricted and not available to the recipient until the current rate is provided to the DGO.

Generally, indirect costs rates for IHS grantees are negotiated with the Division of Cost Allocation *http://rates.psc.gov/* and the Department of the Interior (National Business Center) *http://www.nbc.gov/acquisition/ics/icshome.html*. If your organization has questions regarding the indirect cost policy, please contact the DGO at (301) 443–5204.

4. Reporting

Progress Report. Semi-annual and annual reports are required. A format will be provided. These reports will include a brief comparison of actual accomplishments to the goals established for the period, or, if applicable, provide sound justification for the lack of progress, and other pertinent information as required. Copies of any materials developed shall be attached. Semi-annual progress reports must be submitted within thirty (30) days of the end of the half year. An annual report must be submitted within thirty (30) days after the end of the 12 month time period. Financial Status Report. Semi-annual financial status reports must be submitted within 30 days of the end of the half year. Final financial status reports are due within 90 days of expiration of the budget/project period. Standard Form 269 (long form) will be used for financial reporting. Reports. Grantees are

responsible and accountable for accurate reporting of the Progress Reports and Financial Status Reports which are generally due semi-annually. Financial Status Reports (SF–269) are due 90 days after each budget period and the final SF–269 must be verified from the grantee records on how the value was derived. Grantees must submit reports by the due date that will be outlined in the terms and conditions of the grant award.

Failure to submit required reports within the time allowed may result in suspension or termination of an active grant, withholding of additional awards for the project, or other enforcement actions such as withholding of payments or converting to the reimbursement method of payment. Continued failure to submit required reports may result in one or both of the following: (1) The imposition of special award provisions; and (2) the non-funding or non-award of other eligible projects or activities. This applies whether the delinquency is attributable to the failure of the grantee organization or the individual responsible for preparation of the reports.

Telecommunication for the hearing impaired is available at: TTY (301) 443–6394.

VII. Agency Contact(s)

We encourage inquiries concerning this announcement.

For program technical assistance, contact: Bryan E. Wooden, LICSW, LCSW–C, DCSW, Office of Clinical and Preventive Services, Deputy Director, Division of Behavioral Health, 801 Thompson Avenue, Reyes Building, Suite 300, Rockville, Maryland 20852. *Telephone:* (301) 443–2038. *E-mail: bryan.wooden@ihs.gov*.

For financial, grants management, or budget assistance, contact:

Roscoe Brunson, Jr., 801 Thompson Ave, Reyes Bldg, Suite 360, Rockville, MD 20852. *Telephone:* (301) 443–5204. *E-mail: Roscoe.Brunson@ihs.gov*.

VIII. Other Information

This and other IHS funding opportunity announcements can be found on the IHS Web site, Internet address: *http://www.ihs.gov/NonMedicalPrograms/gogp/index.cfm*. Click on ''Funding Opportunities'' then identify the appropriate opportunity.

Dated: November 30, 2009.

Randy Grinnell,

Deputy Director, Indian Health Service.

[FR Doc. E9–29120 Filed 12–7–09; 8:45 am]

BILLING CODE 4165–16–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[USCG–2009–0988]

Great Lakes Pilotage Advisory Committee

AGENCY: Coast Guard, DHS.

ACTION: Notice of meeting; request for applications.

SUMMARY: The Coast Guard announces a Great Lakes Pilotage Advisory Committee (GLPAC) meeting and seeks applications to fill two vacancies on the GLPAC. GLPAC provides advice and makes recommendations to the Secretary on a wide range of issues related to pilotage on the Great Lakes, including the rules and regulations that govern the registration, operating requirements, and training policies for all U.S. registered pilots. The Committee also advises on matters related to ratemaking to determine the appropriate charge for pilot services on the Great Lakes.

DATES: GLPAC will meet on Thursday, January 21, 2010, from 9 a.m. to 12:30 p.m. The meeting may close early if all business is finished. Written material and requests to make oral presentations or to have a copy of your material distributed to each member of the committee should reach us on or before January 7, 2010. Completed applications for GLPAC membership should reach us by January 7, 2010, but will be accepted until the positions are filled.

ADDRESSES: GLPAC will meet at Coast Guard Headquarters, 2100 2nd Street, SW., Washington, DC 20593–0001, Room 51310. Send written material and requests relating to the GLPAC meeting to Mr. John Bobb (see **FOR FURTHER INFORMATION CONTACT**). Electronically submitted material must be in Adobe or Microsoft Word format. Send applications for GLPAC membership to Mr. Bobb. An application form for GLPAC membership, as well as this notice, is available in our online docket, USCG–2009–0988, at *http://www.regulations.gov;* enter the docket number for this notice (USCG–2009–0988) in the Search box, and click ''Go.'' You may also contact Mr. Bobb for a copy of the application form.

FOR FURTHER INFORMATION CONTACT: Mr. John Bobb, GLPAC Assistant Designated Federal Official (ADFO), Commandant (CG–54121), U.S. Coast Guard Headquarters, 2100 Second Street, SW., Stop 7581, Washington, DC 20593–7581; telephone 202–372–1532, fax 202–372–1991, or e-mail at *john.k.bobb@uscg.mil.*

SUPPLEMENTARY INFORMATION: The GLPAC is a Federal advisory committee under 5 U.S.C. App. 2 (Pub. L. 92–463). It was established under the authority of 46 U.S.C. 9307, and advises the Secretary of Homeland Security and the Coast Guard on Great Lakes pilot registration, operating requirements, training policies, and pilotage rates.

GLPAC meets at least once a year, normally at Coast Guard Headquarters, Washington, DC. It may also meet for extraordinary purposes. Further information about GLPAC is available by searching on ''Great Lakes Pilotage Advisory Committee'' at *http://www.fido.gov/facadatabase/*.

Notice of Meeting

GLPAC will hold a meeting at Coast Guard Headquarters on January 21, 2010.

The agenda includes the following:

(1) GLPAC review of public comments solicited by the Coast Guard in the **Federal Register** of July 21, 2009 (''Great Lakes Pilotage Ratemaking Methodology,'' 74 FR 35838), in accordance with requirements of 46 U.S.C. 9307(d) for consultation with GLPAC before taking any significant action relating to Great Lakes pilotage; and

(2) Appointment of seventh member in compliance with requirements of 46 U.S.C. 9307(b)(2)(E). Applications for this position were solicited in a **Federal Register** notice published August 26, 2009 (74 FR 43148) and will be accepted until the position is filled.

The meeting is open to the public. Please note that the meeting may close early if all business is finished. At the Chair's discretion, members of the public may make oral presentations during the meeting. For information on facilities or services for individuals with disabilities or to request special assistance at the meeting, contact Mr. John Bobb (see **FOR FURTHER INFORMATION CONTACT**) as soon as possible.

Request for Applications

One appointment will be made from applicants representing the interests of vessel operators that contract for Great Lake pilotage services. A second member will be selected to represent shippers whose cargoes are transported through Great Lakes ports. To be eligible, applicants should have particular expertise, knowledge, and experience regarding the regulations and policies on the pilotage of vessels on the Great Lakes, and at least 5 years

practical experience in maritime operations. GLPAC members serve for a term of 3 years and may be reappointed. All members serve at their own expense but receive reimbursement for travel and per diem expenses from the Federal Government.

In support of the Coast Guard policy on gender and ethnic nondiscrimination, we encourage qualified men and women and members of all racial and ethnic groups to apply. The Coast Guard values diversity, which includes persons with different characteristics and attributes who will enhance the mission of the Coast Guard.

Dated: November 30, 2009.

W.A. Muilenburg,

Captain, U.S. Coast Guard, Office of Waterways Management.

[FR Doc. E9–29125 Filed 12–7–09; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG–2009–0973]

Random Drug Testing Rate for Covered Crewmembers

AGENCY: Coast Guard, DHS.

ACTION: Notice of minimum random drug testing rate.

SUMMARY: The Coast Guard has set the calendar year 2010 minimum random drug testing rate at 50 percent of covered crewmembers.

DATES: The minimum random drug testing rate is effective January 1, 2010 through December 31, 2010. Marine employers must submit their 2009 Management Information System (MIS) reports no later than March 15, 2010.

ADDRESSES: Annual MIS reports may be submitted to Commandant (CG–545), U.S. Coast Guard Headquarters, 2100 Second Street, SW., STOP 7581, Washington, DC 20593–7581 or by electronic submission to the following Internet address: *http://homeport.uscg.mil/Drugtestreports.*

FOR FURTHER INFORMATION CONTACT: For questions about this notice, please contact Mr. Robert C. Schoening, Drug and Alcohol Program Manager, Office of Investigations and Casualty Analysis (CG–545), U.S. Coast Guard Headquarters, telephone 202–372–1033. If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION: Under 46 CFR 16.230, the Coast Guard requires marine employers to establish random drug testing programs for covered crewmembers on inspected and uninspected vessels.

Every marine employer is required by 46 CFR 16.500 to collect and maintain a record of drug testing program data for each calendar year, and submit this data by 15 March of the following year to the Coast Guard in an annual MIS report. Marine employers may either submit their own MIS reports or have a consortium or other employer representative submit the data in a consolidated MIS report.

The purpose of setting a minimum random drug testing rate is to assist the Coast Guard in analyzing its current approach for deterring and detecting illegal drug abuse in the maritime industry. The testing rate for calendar year 2010 is 50 percent.

The Coast Guard may lower this rate if, for two consecutive years, the drug test positive rate is less than 1.0 percent, in accordance with 46 CFR part 16.230(f)(2).

Since 2008 MIS data indicates that the positive rate is greater than one percent industry-wide (1.53 percent), the Coast Guard announces that the minimum random drug testing rate will continue at 50 percent of covered employees for the period of January 1, 2010 through December 31, 2010 in accordance with 46 CFR 16.230(e).

Each year, the Coast Guard will publish a notice reporting the results of random drug testing for the previous calendar year's MIS data and the minimum annual percentage rate for random drug testing for the next calendar year.

Dated: November 20, 2009.

K.S. Cook,

Rear Admiral, United States Coast Guard, Director of Prevention Policy.

[FR Doc. E9–29127 Filed 12–7–09; 8:45 am]

BILLING CODE P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R9–FHC–2009–N166; 71490–1351–0000–L5]

Letters of Authorization To Take Marine Mammals

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of issuance.

SUMMARY: In accordance with the Marine Mammal Protection Act of 1972, as amended (MMPA), we, the Fish and Wildlife Service, have issued letters of authorization to take polar bears and Pacific walrus incidental to oil and gas industry exploration, development, and production activities in the Beaufort Sea and adjacent northern coast of Alaska and incidental to oil and gas industry exploration activities in the Chukchi Sea and adjacent western coast of Alaska.

FOR FURTHER INFORMATION CONTACT: Craig Perham at the Fish and Wildlife Service, Marine Mammals Management Office, 1011 East Tudor Road, Anchorage, AK 99503; (800) 362–5148 or (907) 786–3810.

SUPPLEMENTARY INFORMATION: On August 2, 2006, we published in the **Federal Register** (71 FR 43926) a final rule establishing regulations that allow us to authorize the nonlethal, incidental, unintentional take of small numbers of polar bears and Pacific walrus during year-round oil and gas industry exploration, development, and production activities in the Beaufort Sea and adjacent northern coast of Alaska for 5 years from date of issuance of that rule. In accordance with that rule, section 101(a)(5)(A) of the MMPA, and our regulations at 50 CFR part 18, subpart J, we issued a letter of authorization (LOA) to the following companies in the Beaufort Sea and adjacent northern coast of Alaska.

BEAUFORT SEA, LETTERS OF AUTHORIZATION FOR 2008

Company	Activity	Project	Date issued
Denali—the Alaska Pipeline Group	Exploration	2008 Hydrology study	Sept 15, 2008.
Brooks Range Petroleum Corp	Exploration	North Shore Sak River	Nov 1, 2008.
Pioneer Natural Resources Alaska, Inc	Production	Oooguruk Project	Dec 15, 2008.

BEAUFORT SEA, LETTERS OF AUTHORIZATION FOR 2009

Company	Activity	Project	Date issued
BP Exploration Alaska, Inc	Development	Liberty Development	Jan 7, 2009.
Shell Offshore, Inc	Exploration	On-ice Buoy Deployment	Jan 8, 2009.
ConocoPhillips Alaska, Inc	Exploration	Pioneer #1	Jan 15, 2009.
ConocoPhillips Alaska, Inc	Exploration	Grandview 1 East	Jan 15, 2009.
ConocoPhillips Alaska, Inc	Development	CD5 Satellite Develop	Jan 15, 2009.
Savant Alaska, LLC	Exploration	Badami Redevelopment	Jan 16, 2009.
BP Exploration Alaska, Inc	Development	Challenge Is. well removal	Jan 15, 2009.
BP Exploration Alaska, Inc	Exploration	Winter seismic	Jan 15, 2009.
Brooks Range Petroleum Corp	Exploration	East Shore	Jan 15, 2009.
Brooks Range Petroleum Corp	Exploration	West Shore	Jan 15, 2009.
Brooks Range Petroleum Corp	Exploration	UltraStar	Jan 15, 2009.
Anadarko Petroleum Co	Exploration	Gubik, Chandler, Wolf Cr	Feb 3, 2009.
Kupik-Veritas DGC Land Inc	Exploration	SOI 3D seismic	Feb 4, 2009.
Kupik-Veritas DGC Land Inc	Exploration	Point Thomson 3D seismic	Feb 4, 2009.
Eni U.S, Operating Co, Inc	Development	Nikaitchuq	Feb 20, 2009.
ExxonMobil Production Co	Development	Point Thomson	Feb 4, 2009.
Marsh Creek, LLC	Development	Umiat Test Well 9 Remediation	Feb 24, 2009.
Marsh Creek, LLC	Development	Atigaru Point Test Well Remediation	Feb 24, 2009.
UltraStar Exploration, LLC	Exploration	Dewline Deep	Mar 26, 2009.
Alyeska Pipeline Service Co	Production	Trans-Alaska Pipeline	Mar 26, 2009.
Shell Offshore, Inc	Exploration	Scientific Data Device Deployment Program.	Sept 3, 2009.

On June 11, 2008, we published in the **Federal Register** (73 FR 33212) a final rule establishing regulations that allow us to authorize the nonlethal, incidental, unintentional take of small numbers of polar bears and Pacific walrus during year-round oil and gas industry exploration activities in the Chukchi Sea and adjacent western coast of Alaska for 5 years from date of issuance of that rule. In accordance with that rule, section 101(a)(5)(A) of the MMPA, and our regulations at 50 CFR part 18, subpart I, we issued a letter of authorization (LOA) to the following companies in the Chukchi Sea.

CHUKCHI SEA, LETTERS OF AUTHORIZATION FOR 2009

Company	Activity	Project	Date issued
Shell Exploration and Production Co	Exploration	Marine Survey Program	July 16, 2009.
ConocoPhillips Alaska, Inc	Exploration	Site Clearance and Environmental Studies Program.	Aug 6, 2009.

Dated: November 6, 2009.

Geoffrey L. Haskett,

Regional Director, Alaska Region.

[FR Doc. E9–29182 Filed 12–7–09; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–70,201]

Tivoly, Inc., Derby Line, VT; Notice of Affirmative Determination Regarding Application for Reconsideration

By application dated November 4, 2009, the International Association of Machinists, Local Lodge 1829 requested administrative reconsideration of the negative determination regarding workers' eligibility to apply for Trade Adjustment Assistance (TAA) applicable to workers and former workers of the subject firm. The determination was issued on October 2, 2009. The Notice of Determination will soon be published in the **Federal Register**.

The initial investigation resulted in a negative determination based on the finding that imports of cutting tools did not contribute importantly to worker separations at the subject firm and no shift of production to a foreign source occurred.

In the request for reconsideration, the petitioner provided additional information regarding customers of the subject firm.

The Department has carefully reviewed the request for reconsideration and the existing record and has determined that the Department will conduct further investigation to determine if the workers meet the eligibility requirements of the Trade Act of 1974.

Conclusion

After careful review of the application, I conclude that the claim is of sufficient weight to justify reconsideration of the U.S. Department of Labor's prior decision. The application is, therefore, granted.

Signed at Washington, DC, this 16th day of November 2009.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–29147 Filed 12–7–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–71,108]

Air Way Automation, Inc., Grayling, MI; Notice of Affirmative Determination Regarding Application for Reconsideration

By application dated August 20, 2009, a company official requested administrative reconsideration of the negative determination regarding workers' eligibility to apply for Trade Adjustment Assistance (TAA) applicable to workers and former workers of the subject firm. The determination was issued on August 3, 2009. The Notice of Determination was published in the **Federal Register** on September 22, 2009 (74 FR 48304).

The initial investigation resulted in a negative determination based on the finding that imports of parts feeding and assembly equipment did not contribute importantly to worker separations at the subject firm and no shift of production to a foreign source occurred.

In the request for reconsideration, the petitioner provided additional information regarding customers of the subject firm and increasing foreign competition in the bidding process.

The Department has carefully reviewed the request for reconsideration and the existing record and has determined that the Department will conduct further investigation to determine if the workers meet the eligibility requirements of the Trade Act of 1974.

Conclusion

After careful review of the application, I conclude that the claim is of sufficient weight to justify reconsideration of the U.S. Department of Labor's prior decision. The application is, therefore, granted.

Signed at Washington, DC, this 21st day of October 2009.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–29154 Filed 12–7–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–71,174]

General Electric Company, Transportation Division, Erie, PA; Notice of Affirmative Determination Regarding Application for Reconsideration

By application dated October 28, 2009, the petitioners requested administrative reconsideration of the negative determination regarding workers' eligibility to apply for Trade Adjustment Assistance (TAA) applicable to workers and former workers of the subject firm. The determination was issued on October 8, 2009. The Notice of Determination will soon be published in the **Federal Register**.

The initial investigation resulted in a negative determination based on the finding that imports of locomotives, locomotive parts, marine and stationary engines, and various propulsion systems did not contribute importantly to worker separations at the subject firm. The investigation revealed that the subject firm did not shift production of locomotives, locomotive parts, marine and stationary engines, and various propulsion systems to foreign countries during the period under investigation.

In the request for reconsideration, the petitioner alleged that General Electric reduced employment levels at the subject facility as a direct result of shifts in production to Brazil, China and Kazakhstan.

The Department has carefully reviewed the request for reconsideration and the existing record and has determined that the Department will conduct further investigation to determine if the workers meet the eligibility requirements of the Trade Act of 1974.

Conclusion

After careful review of the application, I conclude that the claim is of sufficient weight to justify reconsideration of the U.S. Department of Labor's prior decision. The application is, therefore, granted.

Signed at Washington, DC, this 16th day of November 2009.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–29155 Filed 12–7–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[OMB Control No. 1205–0392]

Comment Request for Information Collection for the Trade Act Participant Report, Extension Without Revisions

AGENCY: Employment and Training Administration.

ACTION: Notice.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden conducts a preclearance consultation program to provide the general public and federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) [44 U.S.C. 3506(c)(2)(A)]. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. Currently, the Employment and Training Administration is soliciting comments concerning the collection of data on the Trade Act Participant Report, which is due to expire March 31, 2010.

The Department of Labor submitted this information collection request (ICR), utilizing emergency review procedures, on July 17, 2009, to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. Chapter 35) and 5 CFR 1320.13. OMB approved the collection through March 31, 2010. A copy of this ICR, with applicable supporting documentation; including among other things a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained from the RegInfo.gov Web site at *http://www.reginfo.gov/public/do/PRAMain* A copy of the proposed information collection request (ICR) can also be obtained by contacting the office listed below in the addressee section of this notice.

DATES: Written comments must be submitted to the office listed in the addressee's section below on or before February 8, 2010.

ADDRESSES: Submit written comments to Susan Worden, Room N–5428 Employment and Training

Administration, 200 Constitution Avenue, NW., Washington, DC 20210. *Telephone number:* 202–693–3517 (this is not a toll-free number). *Fax:* 202–693–3584. *E-mail: worden.susan@dol.gov.*

SUPPLEMENTARY INFORMATION:

I. *Background:* In order to provide data that is broken out by industry, as mandated by Section 249B (c) of the Trade Act of 1974, as amended, a comprehensive range of TAA participant activities and outcomes must be broken out to industry sectors from state level aggregates that were previously provided on two of the three TAA participant reports: OMB 1205–0016, and OMB 1205–0459. That reporting system required states to submit, annually, separate participation and performance reports using formats, definitions, instructions, and submission procedures that differ from those required under the new report. In some instances, that reporting system resulted in confusion regarding the time periods used for calculating program performance, what data are to be reported, and how the data are prepared for submission on a timely basis. These inconsistencies have limited the reliability of reported data, consequently reducing the Department's ability to make the most effective use of participant data for establishing state level funding needs, reporting on the progress of programs to the Administration and Congress, and imposing unnecessary administrative burdens on CSAs that seek to coordinate service delivery and performance measurement in a local One-Stop environment. Section 239(j)(3) of the Trade Act provides that ''each cooperating State or cooperating State agency shall establish procedures that are consistent with guidelines to be issued by the Secretary to ensure that the data reported are valid and reliable.''

As a result of new statutory provisions, and in the interest of providing data on the administration and performance of the TAA program that is reliable, usable and consistent, the current information collection encompassed in OMB Control No. 1205–0392 consolidates information previously collected under three separate data collections into a single streamlined reporting system. As a result of this consolidation, OMB 1205–0016 and OMB 1205–0459 have been discontinued.

II. *Review Focus:*

The Department of Labor is particularly interested in comments which:

* Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

* Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

* Enhance the quality, utility, and clarity of the information to be collected; and

* Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

III. *Current Actions:*

Type of Review: extension without changes.

Title: Trade Act Participant Report.

OMB Number: 1205–0392.

Affected Public: State, Local, or Tribal Governments.

Total Estimated Number of Respondents: 50.

Frequency of Collection: Quarterly.

Total Responses: $50 \times 4 = 200$.

Average Time per Response: 45 hours per quarterly submission.

Estimated Total Burden Hours: 9,000.

Total Burden Cost for Respondents: $0.

Comments submitted in response to this comment request will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated: December 2, 2009.

Jane Oates,

Assistant Secretary, Employment and Training Administration.

[FR Doc. E9–29186 Filed 12–7–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–71,194]

Delphi Rochester Operation, Delphi Powertrain Division, a Subsidiary of Delphi Corporation, Currently Known as GM Components Holding, LLC, Including On-Site Leased Workers From Bartech Rochester, New York; Amended Certification Regarding Eligibility to Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (''Act''), 19 U.S.C. 2273, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on July 24, 2009, applicable to the workers of Delphi Rochester Operations, Delphi Powertrain Division, A subsidiary of Delphi Corporation, including on-site leased workers from Bartech, Rochester, New York. The notice was published in the **Federal Register** on September 2, 2009 (74 FR 45477).

At the request of a company official, the Department reviewed the certification for workers of the subject firm. The workers are engaged in activities related to the production of automotive emission devices and fuel and air components.

Information shows that effective October 7, 2009, the Delphi Rochester Operations became known as GM Components Holding, LLC. Information also shows that the workers separated from employment at the subject firm had their wages reported under a separate unemployment insurance (UI) tax account for GM Components Holding, LLC.

According, the Department is amending this certification to properly reflect this matter.

The intent of the Department's certification is to include all workers of the subject firm who were adversely affected by the shift in production of automotive emission devices and fuel and air components to China.

The amended notice applicable to TA–W–71,194 is hereby issued as follows:

All workers of Delphi Rochester Operations, Delphi Powertrain Division, a subsidiary of Delphi Corporation, currently known as GM Components Holding, LLC, Rochester, New York, including on-site leased workers from Bartech, who became totally or partially separated from employment on or after June 9, 2009, through two years from the date of certification, and all workers in the group threatened with total

or partial separation from employment on date of certification through two years from the date of certification, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended.

Signed in Washington, DC, this 17th day of November 2009.

Elliott S. Kushner,

Certification Officer, Division Of Trade Adjustment Assistance.

[FR Doc. E9–29142 Filed 12–7–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–70,063]

AIT, American Integration Technologies, Doing Business as Advanced Integration Technologies, Parent of Integrated Flow Systems LLC, Pflugerville, TX; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (''Act''), 19 U.S.C. 2273, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on September 23, 2009, applicable to workers of AIT, a subsidiary of American Integrated Technologies, Pflugerville, Texas. The notice was published in the **Federal Register** November 17, 2009 (74 FR 59253).

At the request of the State agency, the Department reviewed the certification for workers of the subject firm. The workers are engaged in the production of high purity stainless steel weldments for gas and chemical delivery systems.

Information shows that as the result of corporate decisions in April 2009, the correct name of the subject firm should read AIT, American Integration Technologies, doing business as Advanced Integration Technologies, parent of Integrated Flow Systems. Workers separated from employment at the subject firm had their wages reported under two separate unemployment insurance (UI) tax accounts—Integrated Flow Systems, LLC before April 2009, and American Integration Technologies after April 2009.

Accordingly, the Department is amending this certification to properly reflect this matter.

The intent of the Department's certification is to include all workers of the subject firm who were adversely affected by the shift in production of high purity stainless steel weldments for gas and chemical delivery systems to the Philippines.

The amended notice applicable to TA–W–70,832 is hereby issued as follows:

All workers of AIT, American Integration Technologies, doing business as Advanced Integration Technologies, parent of Integrated Flow Systems LLC, Pflugerville, Texas, who became totally or partially separated from employment on or after May 18, 2008 through September 23, 2011, and all workers in the group threatened with total or partial separation from employment on date of certification through two years from the date of certification, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended.

Signed at Washington, DC this 17th day of November 2009.

Michael W. Jaffe,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–29146 Filed 12–7–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–65,037]

Chrysler LLC, Warren Truck Assembly Plant, Including On-Site Leased Workers From Caravan Knight and Design Systems, Warren, MI; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974 (19 U.S.C. 2273), and Section 246 of the Trade Act of 1974 (26 U.S.C. 2813), as amended, the Department of Labor issued a Certification of Eligibility to apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance on February 13, 2009, applicable to workers of Chrysler LLC, including on-site leased workers from Caravan Knight, at the Warren Truck Assembly Plant in Warren, Michigan. The notice was published in the **Federal Register** on March 3, 2009 (74 FR 9278).

At the request of the State agency, the Department reviewed the certification for workers of the subject firm. The workers assemble Dodge Dakota, Dodge Ram and Mitsubishi Raider pickups.

New information shows that workers leased from Design Systems were employed on-site at the Warren, Michigan, location of Chrysler LLC, Warren Truck Assembly Plant. The Department has determined that these workers were sufficiently under the control of the subject firm to be considered leased workers.

Based on these findings, the Department is amending this certification to include workers leased from Design Systems working on-site at the Warren, Michigan, location of Chrysler LLC, Warren Truck Assembly Plant.

The amended notice applicable to TA–W–65,037 is hereby issued as follows:

All workers of Chrysler LLC, Warren Truck Assembly Plant, including on-site leased workers from Caravan Knight and Design Systems, Warren, Michigan, who become totally or partially separated from employment on or after January 21, 2008 through February 13, 2011 are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974, and are also eligible to apply for alternative trade adjustment assistance under Section 246 of the Trade Act of 1974.

Signed in Washington, DC, this 19th day of November 2009.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–29145 Filed 12–7–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–70,623]

General Motors Company, Lordstown Complex, Including On-Site Leased Workers From Adroit Software & Consulting, Inc., Acro Service Corporation, the Bartech Group and Aerotek Automotive, Warren, OH; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (''Act''), 19 U.S.C. 2273, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on September 2, 2009, applicable to workers of General Motors Company, Lordstown Assembly Plant, Warren, Ohio. The notice was published in the **Federal Register** on November 5, 2009 (74 FR 57340). The notice was amended on October 13, 2009 to include on-site leased workers from Adroit Software & Consulting, Inc., Acro Service Corp., The Bartech Group and Aerotek Automotive. The notice was published in the **Federal Register** on October 27, 2009 (74 FR 55261).

At the request of a company official, the Department reviewed the certification for workers of the subject firm. The workers assemble the Chevrolet Cobalt and Pontiac G5. The workers are not separately identifiable by vehicle.

The company reports that the Lordstown Complex facility located at the Warren, Ohio location of General Motors Company includes both the assembly plant and stamping plant and together are part of a continuous operation and are considered a singular entity.

Based on these findings, the Department is amending this certification to correctly identify the Lordstown facility as the Lordstown Complex of General Motors, Warren, Ohio.

The amended notice applicable to TA–W–70,623 is hereby issued as follows:

All workers of General Motors Company, Lordstown Complex, including on-site leased workers from Adroit Software & Consulting, Inc., Acro Service Corporation, The Bartech Group and Aerotek Automotive, Warren, Ohio, who became totally or partially separated from employment on or after May 18, 2008, through September 2, 2011, and all workers in the group threatened with total or partial separation from employment on date of certification through two years from the date of certification, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended.

Signed at Washington, DC, this 19th day of November 2009.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–29152 Filed 12–7–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–70,805]

Honeywell International, Aerospace Avionics, Including On-Site Leased Workers From Manpower and PDS Tech, Inc., Deer Valley, Phoenix, AZ; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (''Act''), 19 U.S.C. 2273, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on August 20, 2009, applicable to workers of Honeywell International Aerospace Avionics including on-site leased workers of Manpower, Deer Valley, Phoenix, Arizona. The notice was published in the **Federal Register** on September 22, 2009 (74 FR 48301).

At the request of a company official, the Department reviewed the certification for workers of the subject firm. The workers are engaged in activities related to the production of avionics.

The company reports that on-site leased workers from PDS Tech, Inc. were employed on-site at the Deer Valley, Phoenix, Arizona location of Honeywell International Aerospace Avionics. The Department has determined that these workers were sufficiently under the control of the subject firm to be considered leased workers.

Based on these findings, the Department is amending this certification to include workers leased from PDS Tech, Inc. working on-site at the Deer Valley, Phoenix, Arizona location of Honeywell International Aerospace Avionics.

The amended notice applicable to TA–W–70,805 is hereby issued as follows:

All workers of Honeywell International, Aerospace Avionics, including on-site leased workers of Manpower and PDS Tech. Inc., Deer Valley, Phoenix, Arizona, who became totally or partially separated from employment on or after May 18, 2008, through August 20, 2011, and all workers in the group threatened with total or partial separation from employment on date of certification through two years from the date of certification, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended.

Signed in Washington, DC, this 19th day of November 2009.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–29153 Filed 12–7–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–70,609]

DES/KDM; Working at FMC Manufacturing, LLC, a Subsidiary of Midwest Motorcycle Supply, Monmouth, IL; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (''Act''), 19 U.S.C. 2273, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on September 28, 2009, applicable to workers of FMC Manufacturing, LLC, a subsidiary of Midwest Motorcycle Supply, Monmouth, Illinois. The notice will be published soon in the **Federal Register**.

At the request of the State agency, the Department reviewed the certification for workers of the subject firm. The workers are engaged in the production of motorcycle frames, swing arms and handlebars.

Information shows that the correct identity of the subject firm worker group should read DES/KDM Working at FMC Manufacturing, LLC, a subsidiary of Midwest Motorcycle Supply, Monmouth, Illinois. The workers separated from employment at the subject firm had their wages reported under a separated unemployment insurance (UI) tax account for DES/KDM.

Accordingly, the Department is amending this certification to properly reflect this matter.

The intent of the Department's certification is to include all workers of the subject firm who were adversely affected by increased imports of motorcycle frames, swing arms and handlebars.

The amended notice applicable to TA–W–70,609 is hereby issued as follows:

All workers of DES/KDM working at FMC Manufacturing, LLC, a subsidiary of Midwest Motorcycle Supply, Monmouth, Illinois, who became totally or partially separated from employment on or after May 22, 2008, through September 28, 2011, and all workers in the group threatened with total or partial separation from employment on date of certification through two years from the date of certification, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended.

Signed at Washington, DC this 10th day of November 2009.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–29151 Filed 12–7–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–70,460]

Delphi Steering Including On-Site Leased Workers From ACRO Service Corporation, et al.; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (''Act''), 19 U.S.C. 2273, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on July 14, 2009, applicable to workers of Delphi Steering, including on-site leased workers from Bartech and Securitas, Saginaw, Michigan. The notice was published in the **Federal Register** on September 2, 2009 (74 FR 45477). The notice was amended on October 7, 2009 to include on-site leased workers. The notice was published in the **Federal Register** on October 20, 2009 (74 FR 53760–53761).

At the request of the State Agency, the Department reviewed the certification for workers of the subject firm. The workers are engaged in the production of steering systems and components such as steering columns, gears, pumps and electronic power steering systems.

The company reports that on-site leased workers from Interim Health Care were employed on-site at the Saginaw, Michigan location of Delphi Steering. The Department has determined that these workers were sufficiently under the control of the subject firm to be considered leased workers.

Based on these findings, the Department is amending this certification to include workers leased from Interim Health Care working on-site at the Saginaw, Michigan location of Delphi Steering.

The amended notice applicable to TA–W–70,460 is hereby issued as follows:

All workers of Delphi Steering, including on-site leased workers from Bartech, Securitas, Acro Service Corp., Aerotek, Inc., Continental, Inc., Dynamic Corp., G-Tech Professional Staffing, Inc., GlobalEdge Technologies, Inc. (formerly CAE Tech), Gonzalez Contract Services, Integrated Partners Group LLC, Kelly Services, Manpower, Inc., Rapid Global Business Solutions, Inc., TAC Worldwide, Trialon Corp., Trison Business Solutions, Wright K. Technologies and Interim Health Care, Saginaw, Michigan, who became totally or partially separated from employment on or after May 20, 2008, through July 14, 2011, and all workers in the group threatened with total or partial separation from employment on date of certification through two years from the date of certification, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended.

Signed in Washington, DC, this 10th day of November 2009.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–29150 Filed 12–7–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

[Application No. L–11575]

Notice of Proposed Individual Exemption Involving Ford Motor Company, Located in Detroit, MI

AGENCY: Employee Benefits Security Administration, U.S. Department of Labor.

ACTION: Notice of proposed individual exemption.

This document contains a notice of pendency (the Notice) before the Department of Labor (the Department) of a proposed individual exemption from certain prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (the Act or ERISA). The transactions involve the UAW Ford Retirees Medical Benefits Plan (the Ford VEBA Plan) and its funding vehicle, the UAW Retiree Medical Benefits Trust (the VEBA Trust), (collectively the VEBA).[1] The proposed exemption, if granted, would affect the VEBA, and its participants and beneficiaries.

DATES: *Effective Date:* If granted, this proposed exemption will be effective as of December 31, 2009.

DATES: Written comments and requests for a public hearing on the proposed exemption should be submitted to the Department within 40 days from the date of publication of this **Federal Register** Notice.

ADDRESSES: All written comments and requests for a public hearing concerning the proposed exemption should be sent to the Office of Exemption Determinations, Employee Benefits Security Administration, Room N–5700, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington DC 20210, Attention: Application No. L–11575. Interested persons are also invited to submit comments and/or hearing requests to EBSA via e-mail or FAX. Any such comments or requests should be sent either by e-mail to: *ford@dol.gov,* or by FAX to (202) 219–0204 by the end of the scheduled comment period. The application for exemption and the comments received will be available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, U.S. Department of Labor, Room N–1513, 200 Constitution Avenue, NW., Washington, DC 20210. Comments and hearing requests will also be available online at *http://www.regulations.gov* and *http://www.dol.gov/ebsa,* at no charge. **Warning:** If you submit written comments or hearing requests, do not include any personally-identifiable or confidential business information that you do not want to be publicly-disclosed. All comments and hearing requests are posted on the Internet exactly as they are received, and they can be retrieved by most Internet search engines. The Department will make no deletions, modifications or redactions to the comments or hearing requests received, as they are public records.

FOR FURTHER INFORMATION CONTACT: Warren Blinder, Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor, telephone (202) 693–8553. (This is not a toll-free number).

SUPPLEMENTARY INFORMATION: This document contains a notice of proposed individual exemption from the restrictions of sections 406(a)(1)(A), 406(a)(1)(B), 406(a)(1)(D), 406(a)(1)(E), 406(a)(2), 406(b)(1), 406(b)(2), and 407(a) of ERISA. The proposed exemption has been requested in an application filed by the Ford Motor Company (Ford or the Applicant) pursuant to section 408(a) of ERISA and in accordance with the procedures set forth in 29 CFR 2570, Subpart B (55 FR 32836, August 10, 1990). Effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978, (43 FR 47713, October 17, 1978) transferred the authority of the Secretary of the Treasury to issue exemptions of the type requested to the Secretary of Labor. Accordingly, this proposed exemption is being issued solely by the Department.

[1] Because the Ford VEBA Plan will not be qualified under section 401 of the Internal Revenue Code of 1986, as amended (the Code), there is no jurisdiction under Title II of the Act pursuant to section 4975 of the Code. However, there is jurisdiction under Title I of the Act.

Summary of Facts and Representations [2]

1. The Applicant

Ford and its subsidiaries have been engaged primarily in worldwide automotive production and marketing operations. Ford designs, manufactures, and markets vehicles worldwide, with its largest operating presence in North America. Ford maintains its headquarters in Dearborn, Michigan. As of December 31, 2008, Ford had approximately 71,000 active employees in the United States, of whom approximately 42,000 are represented by the UAW and other unions. Approximately 285,000 retirees and dependents in the U.S. receive retiree health benefits from Ford, and of this total, approximately 196,000 are hourly retirees and spouses, surviving spouses, and eligible dependents. As of December 31, 2008, Ford had total assets on its consolidated balance sheet of $218 billion.

2. Other Parties in Interest in the Covered Transactions

In addition to the Applicant, the parties in interest involved in the covered transactions described herein are (1) the committee that manages the VEBA Trust and is the administrator and a named fiduciary of the Ford VEBA Plan (the Committee), (2) an independent fiduciary to be engaged by the Committee to manage employer securities held by the VEBA Trust (the Independent Fiduciary), (3) the trustee of the VEBA Trust, State Street Bank and Trust Company (the Trustee), and (4) the Ford-UAW Holdings LLC (described below). The role of each of these parties is described in detail below.

3. Background

Ford historically has provided retiree medical benefits to former UAW represented employees under the Hospital-Surgical-Medical-Drug-Dental-Vision Program (the Ford Retiree Health Plan). On February 13, 2006, Ford and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (the UAW) and a class of retirees entered into a Settlement Agreement in the case of *UAW* v. *Ford Motor Co.,* No. 05–74730, 2006 WL 1984363 (E.D. Mich. July 13, 2006), *aff'd sub nom. UAW* v. *Gen. Motors Corp.,* 497 F.3d 615 (6th Cir. 2007) (consolidated appeal) (the Hardwick I Settlement Agreement). The case was brought to contest whether Ford has the right to unilaterally modify hourly retiree welfare benefits for hourly retirees who had been represented by the UAW.

Under the terms of the Hardwick I Settlement Agreement, a new health benefit plan was established to mitigate costs shifted to the affected retirees. The benefits provided under the new plan were to be paid from a voluntary employees' beneficiary association (the Mitigation VEBA) controlled by a committee independent of Ford (the Mitigation VEBA Committee). The Mitigation VEBA was to be funded by Ford through cash and other payments, and by contributions from active Ford employees through wage deferrals and the diversion of cost-of-living adjustments. The Hardwick I Settlement Agreement was to remain in effect until at least September 14, 2011, after which either Ford or the UAW could terminate the agreement and reassert its original position regarding Ford's ability to unilaterally terminate retiree health care benefits.

Despite entering into the Hardwick I Settlement Agreement, Ford's retiree health care funding obligations continued to present a significant impact on the Company's financial condition, which had been exacerbated by recent global economic conditions. In addition, many of Ford's competitors enjoyed a sizeable competitive advantage due to the fact that they lacked the legacy expenses attributable to retiree health benefits. For these reasons, in 2007 Ford announced its intention to terminate retiree health care coverage for UAW represented employees and retirees and its plan to terminate the Hardwick I Settlement Agreement, in 2011. The UAW again contested Ford's unilateral right to alter retiree health benefits, asserting that such benefits were vested and could not be modified without consent. Consequently, throughout October and November 2007, the parties attempted to resolve the impasse through prolonged negotiations.

Ultimately, Ford and the UAW agreed to a permanent restructuring of post-retirement medical benefits and the parties executed a Memorandum of Understanding on November 3, 2007 (the MOU), under which benefits would be funded through a new independent voluntary employees' beneficiary association, the VEBA Trust. The UAW and counsel to the class of plaintiffs (Class Counsel) in *Hardwick I* believed that the retiree health benefits of the classes of plaintiffs would have greater security if funded by the VEBA Trust, because it would be independent of Ford. According to the Applicant, this belief was based on an extensive study of Ford financial data, provided by Ford, which led to the conclusion that in the event of a Ford bankruptcy, the assets in the VEBA would have greater security.

Under the MOU, the Ford VEBA Plan and the VEBA Trust would assume responsibility for post-retirement medical benefits commencing in 2010. In exchange, Ford would deposit or remit $13.2 billion in assets (on a present value basis, as of December 31, 2007) to the VEBA Trust. In outlining benefits for retirees and the terms of Ford's payment obligations, the MOU generally followed the pattern set by GM and Chrysler in their bargaining with the UAW.[3]

Despite the parties agreeing to the MOU, on November 9, 2007, the UAW and a class of retirees (the 2007 Class) filed suit against Ford in the United States District Court for the Eastern District of Michigan (the District Court) challenging Ford's unilateral right to alter retiree health benefits and asserting that such benefits were vested. See *Int'l Union, UAW, et al.* v. *Ford Motor Company,* Civil Action No. 07–14845, 2008 WL 4104329 (E.D. Mich. Aug. 29, 2008).

Following another round of negotiations, Ford and the UAW agreed to a proposed settlement (the 2008 Settlement Agreement). See *Ford Motor Co.,* 2008 WL 4104329. The negotiations included a comprehensive analysis and evaluation of the parties' claims and defenses and of the impact of rising health care costs on Ford's financial condition. The agreement followed a pattern similar to settlement agreements reached between the UAW and GM and Chrysler, respectively.[4]

Pursuant to the Department's request, Ford, the UAW and Class Counsel agreed to amend the proposed form of the trust agreement for the VEBA Trust (the Trust Agreement) to clarify that the Committee, which manages the VEBA Trust and is the administrator and a named fiduciary of the Ford VEBA Plan, would be guided by the principle that the Ford VEBA Plan should provide substantial health benefits for the duration of the lives of all participants and beneficiaries when determining the design of health benefits. After a

[2] The Summary of Facts and Representations is based on the Applicant's representations and does not reflect the views of the Department.

[3] Under the terms of the MOU, UAW-represented employees hired after November 19, 2007 were no longer eligible for retiree health benefit coverage under Ford's retiree medical health plan or under the Ford VEBA Plan funded by the VEBA Trust.

[4] See *UAW* v. *Gen. Motors Corp.,* No. 07–CV–14074–DT, 2008 WL 2968408 (E.D. Mich. July 31, 2008); *UAW* v. *Chrysler,* No. 07–CV–14310, 2008 WL 2980046 (E.D. Mich. July 31, 2008).

fairness hearing, the 2008 Settlement Agreement was approved by the District Court on August 29, 2008 as fair, reasonable, and adequate. See *Ford Motor Co.,* 2008 WL 4104329.

The 2008 Settlement Agreement was intended to permanently resolve the parties' disputes and satisfy and replace the prior Hardwick I Settlement Agreement. Under the 2008 Settlement Agreement, based on the framework of the MOU, Ford's obligations for providing post-retirement medical benefits to the 2007 Class and a group of Ford active employees eligible for retiree benefits (the 2007 Covered Group) would be terminated and the Ford VEBA Plan would be established and maintained by the Committee. The Ford VEBA Plan would be funded by the VEBA Trust, which would be responsible for the payment of post-retirement medical benefits to members of the 2007 Class and the 2007 Covered Group. Under the terms of the 2008 Settlement Agreement, coverage and operations for the Ford VEBA Plan would commence on the day following the ''Implementation Date,'' or January 1, 2010. Ford also agreed to transfer assets to the VEBA Trust on behalf of the Ford VEBA Plan with an estimated worth of $13.2 billion, based on a present value as of December 31, 2007.

As the economic environment continued to deteriorate in late 2008, Ford decided to take further action to remain competitive with other automobile manufacturers and to be able to operate profitably. Ford's principal domestic competitors (GM and Chrysler) were being required, under the terms of government-funded bridge loans, to reduce their public unsecured debt obligations by two-thirds, to reduce by one-half the cash expense associated with their retiree health care VEBA trusts, and to achieve parity in labor costs with the U.S. operations of non-domestic automobile makers. Notably, GM and Chrysler were required to make payments to their employer-specific accounts in the VEBA Trust in at least 50% employer stock. Consequently, Ford and the UAW amended their 2007 collective bargaining agreement to allow Ford to reduce its labor costs. The amendment was ratified by the UAW's membership and became effective on March 16, 2009. On July 23, 2009, Ford, the UAW, and Class Counsel entered into an agreement to amend the 2008 Settlement Agreement (the Amendment Agreement) by providing, *inter alia,* that Ford may use Ford common stock (Ford Common Stock) to pay up to approximately 50% of certain future obligations to the VEBA Trust on behalf of the Ford VEBA Plan. The Amendment Agreement does not reduce the present value of the assets to be provided to the VEBA Trust under the 2008 Settlement Agreement, but instead altered the form and timing of Ford's obligation to the VEBA Trust in a manner that facilitates efforts to restructure Ford's debt and substantially reduce the risk that Ford will default on its obligations to the VEBA Trust.

The revised settlement agreement (the 2009 Settlement Agreement) took effect on November 9, 2009, upon the District Court's issuance of an ''Order and Final Judgment'' granting approval to the Amendment Agreement (the Order and Final Judgment), including approval of the amendment to the Trust Agreement (the Trust Agreement Amendment) and certification of the class under the modified class definition.[5] The 2009 Settlement Agreement, *inter alia,* updates the definition of the ''Class'' under the 2008 Settlement Agreement to include individuals who have retired since the 2008 Settlement Agreement or their spouses and dependents (the Class) and are eligible to receive health care benefits under the Ford VEBA Plan.[6] The 2009 Settlement Agreement also similarly expands the members included in the definition of the 2007 Covered Group (the Covered Group).[7]

4. The Ford VEBA Plan and VEBA Trust

Under the 2009 Settlement Agreement, the UAW Ford Retirees Employees' Beneficiary Association (the Ford EBA), acting through the Committee, will establish and maintain the Ford VEBA Plan, subject to ERISA, for the purpose of providing retiree health benefits to the Class and the Covered Group on and after the day following the Implementation Date, which will be December 31, 2009. Until then, Ford will continue to provide retiree health care benefits to the Class and the Covered Group at the same levels and scope as agreed to in the Hardwick I Settlement Agreement. On the day following the Implementation Date and continuing thereafter, decisions about benefit levels are to be made by the Committee, which will have sole responsibility to determine the scope and level of retiree health benefits available to the Class and the Covered Group under the Ford VEBA Plan.

The Committee is not obligated to design the Ford VEBA Plan to assure that the assets in the VEBA Trust are sufficient to provide benefits to all potential participants and beneficiaries in the Ford VEBA Plan in all future years. Instead, the Committee's long-term objective in designing the Ford VEBA Plan, absent countervailing circumstances, is to provide ''meaningful health benefits'' to all participants and beneficiaries in the Ford VEBA Plan.[8]

Acting through the Committee, the VEBA Trust was established on October 16, 2008, by the Ford EBA, along with the UAW Chrysler Retirees Employee's Beneficiary Association and the UAW GM Retirees Employees' Beneficiary Association.[9] The 2009 Settlement Agreement provides that the VEBA Trust will be responsible for the payment of post-retirement medical benefits under the Ford VEBA Plan to members of the Class and the Covered Group the day following the Implementation Date. The VEBA Trust intends to be qualified under section 501(c)(9) of the Code, as amended, and comply as applicable with the Labor-Management Relations Act of 1947, as amended, 29 U.S.C. 186, and will be subject to ERISA.

The VEBA Trust is structured to have three separate retiree accounts, designed to segregate payments from each of Ford, GM, and Chrysler, pursuant to the terms of each company's settlement agreement with the UAW and the respective class. The purpose of each separate retiree account is to serve as a segregated, dedicated account to be used for the sole purpose of funding benefits provided under each related new plan and defraying the reasonable expenses of each plan. Each retiree account will also have a separate sub-account maintained to hold any Employer Security[10] and any proceeds from the disposition of any such security. Assets from one separate retiree account may not offset the liabilities or defray the expenses attributable to another separate account. The VEBA Trust was

[5] See *Int'l Union, UAW, et al.* v. *Ford Motor Company,* Civil Action No. 07–14845, (E.D. Mich. Nov. 9, 2009) (Doc. # 71, Order and Final J.).

[6] The expanded definition of Class can be found on page 3 of the 2009 Settlement Agreement.

[7] The expanded definition of Covered Group can be found on pages 4–5 of the 2009 Settlement Agreement. Notably, this definition includes certain Ford Active Employees who had attained seniority on or prior to November 19, 2007, and who retire on or after August 15, 2009.

[8] See Section 10.2(a) of the Trust Agreement.

[9] The VEBA Trust consists of three separate employees' beneficiary associations, each of which has a membership of the applicable Ford, GM, and Chrysler retirees who may become eligible to participate in each separate employee welfare benefit plan established on behalf of the members of each respective eligible group.

[10] The Trust Agreement, as amended, defines an ''Employer Security'' as any obligation, note, warrant, bond, debenture, stock, or other security within the meaning of section 407(d)(1) of ERISA that is acquired or held by the VEBA Trust (or arising from any such security through conversion).

structured as a single trust with separate retiree accounts to allow for the pooled investment of assets credited to each of the separate retiree accounts and to provide economies of scale to the Committee in providing services for each of the plans. Unless the Committee decides to establish segregated investment vehicles for specific separate retiree accounts, the assets of the separate retiree accounts, other than any employer security sub-account, will be invested on a pooled basis within the VEBA Trust.

Ford is obligated to make certain payments to the VEBA Trust which will be credited to Ford's separate retiree account under the VEBA Trust (the Ford Separate Retiree Account). The Ford Separate Retiree Account will accept the deposits, contributions, and remittances of, or attributable to, Ford's payments and will pay benefits under the Ford VEBA Plan, as described below. Any Employer Security contributed by Ford to the VEBA Trust will be held in a separate sub-account (the Ford Employer Security Sub-Account).

5. The Committee of the VEBA Trust

The Committee acts as the manager, plan administrator and named fiduciary with respect to the Ford VEBA Plan, and it appoints the Trustee, the Independent Fiduciary (as defined herein) and all investment managers of the VEBA Trust's assets. The Committee may also retain independent professional service providers that it deems necessary and appropriate to administer the Ford VEBA Plan.

The Committee is comprised of eleven individuals, consisting of two groups: six Independent Members and five UAW Members. The initial Independent Members were approved by the District Court in the 2008 Settlement and the UAW Members were appointed by the UAW. The Committee will function completely independently of Ford, which has no power of appointment of the Committee's members. No member of the Committee may be a current or former officer, director or employee of Ford, GM, or Chrysler, except that a retiree who was represented by the UAW in his or her employment with either Ford, GM, or Chrysler, or an employee of any such company who is on leave from the company and is represented by the UAW, may be a UAW Member. None of the Independent Members nor any family members, employers or partners of an Independent Member may have any financial or institutional relationship with either Ford, GM, or Chrysler, if such relationship could reasonably be expected to impair such Independent Member's exercise of independent judgment. Any member of the Committee who is an employee of the UAW or a local union will serve without compensation from the Ford VEBA Plan. Other members of the Committee will be compensated for their services as provided in the Trust Agreement.

The UAW Members serve at the discretion of the UAW and may be removed or replaced, and a successor designated, at any time by written notice by the UAW International President to the Committee. Independent Members serve for a term of three years, except two of the initial Independent Members will have initial terms of two years each, and two other initial Independent Members will have initial terms of one year each. An Independent Member may serve more than one term and will serve on the Committee until his or her death, incapacity to serve, resignation, removal, or expiration of his or her term. An Independent Member may be removed or replaced, and a successor designated, at any time by an affirmative vote of nine of the other members of the Committee. In the event of a vacancy in the group of Independent Members, whether by expiration of a term, resignation, removal, incapacity, or death, a successor Independent Member will be elected by the affirmative vote of nine members. If a successor Independent Member is not appointed within a reasonable time after a vacancy, an arbitrator may be appointed, upon application of any member, to appoint a successor Independent Member to the Committee.

A majority of the members of the Committee then in office shall constitute a quorum for the purpose of transacting any business; provided that at least one Independent Member and one UAW Member are present. Each Member of the Committee present at the meeting shall have one vote. Generally, for any Committee action to take effect, such action must be approved by majority vote of the entire Committee, provided that at least one Independent Member and one UAW Member cast a vote with the majority. In the event of a vacancy in a class of members, the majority of the remaining members of the class may cast the vote of the vacant member. Notwithstanding the foregoing, any change in benefits must receive the affirmative vote of nine or more members.

The Committee will select a chair (the Chair) from among its members. The term of the Chair will continue until he or she ceases to be a member, resigns as Chair or is replaced as Chair with another member by majority vote among the remaining members.

6. Ford's Role and Transition Issues

Ford represents that it will not be a fiduciary with respect to the VEBA Trust or the Ford VEBA Plan, and will have no role in the governance of the VEBA Trust. As noted above, Ford will not have the ability to appoint any member to the Committee, and the Committee is not authorized to act for Ford and is not an agent or representative of Ford for any purpose.

Ford has agreed pursuant to the 2009 Settlement Agreement to cooperate with the UAW and the Committee to undertake reasonable actions as requested to assist the Committee in the transition of responsibility for administration of retiree health benefits by the Committee for the VEBA Trust and the Ford VEBA Plan. Such cooperation may include assisting the Committee in education efforts and communications with respect to members of the Class and the Covered Group so that they understand the terms of the VEBA Trust and the Ford VEBA Plan, the transition of benefit coverage, the claims process, and other administrative changes undertaken by the Committee. At the Committee's request, Ford has also agreed to furnish information to the Committee as reasonably necessary to permit the Committee to effectively administer the VEBA Trust and the Ford VEBA Plan, including data maintained by Ford to the extent permitted by law. Any payments made by Ford for this purpose will not reduce Ford's payment obligations to the VEBA Trust on behalf of the Ford VEBA Plan under the 2009 Settlement Agreement.

If requested by the Committee, and subject to reimbursement for reasonable costs, Ford will continue to perform eligibility determinations for the Ford VEBA Plan for a reasonable period of time, not to exceed 90 days after the Implementation Date, in order to allow the Committee to establish and test an eligibility database. Ford will also assist the Committee in transitioning benefit provider contracts to the Ford VEBA Plan.

To the extent permitted by law, Ford will cooperate with the Committee to allow retiree participants in the Ford VEBA Plan to have required contributions voluntarily withheld on a monthly basis from pension benefits from Ford's pension plan covering members of the Class and the Covered Group (the Ford-UAW Retirement Plan) and to the extent reasonably practical, forwarded to the VEBA Trust to be credited to the Ford Separate Retiree

Account of the VEBA Trust (the Contribution Withholding). A participant may elect or withdraw consent for such pension withholdings at any time by providing 45 days written notice to the Ford-UAW Retirement Plan administrator or such shorter period as may be required by law.

Ford will also cooperate with the Committee to make provision for incorporating the VEBA Trust payment of the ''special benefit'' of $76.20 related to Medicare Part B premiums into the monthly Ford pension checks for eligible retirees and surviving spouses participating in the Ford VEBA Plan (the Part B Payment).

The Ford VEBA Plan will be responsible for the payment of reasonable costs associated with Ford's administration of payment of the Contribution Withholding and the Part B Payment. The Applicant asserts that, to the extent that these payments are prohibited transactions, the statutory exemption for the provision of services provided by section 408(b)(2) of ERISA provides relief from the prohibited transaction restrictions of section 406(a) of ERISA.

ERISA section 408(b)(2) provides relief for the ''[c]ontracting or making reasonable arrangements with a party in interest for office space, or legal, accounting or other services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor.'' Under the Department's regulations, a service is necessary for the establishment or operation of a plan if the service is ''appropriate and helpful to the plan obtaining the service in carrying out the purposes for which the plan is established or maintained.'' 29 CFR 2550.408(b)(2).

According to the Applicant, the Contribution Withholding is helpful to the Ford VEBA Plan as it reduces expenses associated with processing participant contributions and investigating delinquent contributions. This service is also helpful to participants as it assures that contributions are received timely, without the need to mail a check monthly to the Ford VEBA Plan, which thereby will assure continuation of health care coverage under the Ford VEBA Plan for these participants. Accordingly, the Contribution Withholding is appropriate and helpful to the Ford VEBA Plan in carrying out its purpose because it reduces expenses and aids in making sure participants receive benefits without interruption.

With respect to the Part B Payment, the Applicant states that it is appropriate and helpful to the Ford VEBA Plan as it allows the Ford VEBA Plan to take advantage of an existing administrative process that incorporates a defined, monthly payment to participants into pension checks that participants are already receiving. This obviates the need for the Ford VEBA Plan to develop its own administrative process for this purpose and undertake the expense of mailing monthly checks to all participants. Accordingly, the Part B Payment reduces expenses of the Ford VEBA Plan, which helps conserve the amount of resources available to provide benefits.

Furthermore, the Applicant represents that the costs of the Contribution Withholding and the Part B Payment have not yet been determined. However, the Committee will be subject to ERISA's fiduciary responsibility rules when determining the cost structure, and the 2009 Settlement Agreement states that both services will only be provided to the extent permitted by law, and a cost that is not reasonable would not permitted by law.

In the Department's view, relief under section 408(b)(2) would be available for these services provided the conditions of that exemption are satisfied. Ultimately, it is the responsibility of the Committee to determine whether the services provided by Ford satisfy all of the conditions set forth in the statutory exemption and pertinent regulations.

7. Payments to the Ford VEBA Plan

As described in more detail below, on or following the Implementation Date under the 2009 Settlement Agreement, Ford, the Mitigation VEBA Committee, or the trustee of the Mitigation VEBA, as applicable, are required, under the terms of the 2009 Settlement Agreement, to make, on behalf of the Ford VEBA Plan, the following deposits or remittances: (a) Ford shall transfer to the VEBA Trust the balance in the temporary asset account created under the 2008 Settlement Agreement (the TAA) as of the date of transfer or, at Ford's discretion, cash in lieu of some or all of the investments in the TAA; (b) Ford shall transfer to the VEBA Trust two notes issued by Ford (New Note A and New Note B, and collectively, the New Notes) in an aggregate principal amount of $13.2 billion, warrants to acquire 362,391,305 shares of Ford Common Stock at a strike price of $9.20 per share (the Warrants), and any shares of Ford Common Stock transferred by Ford in settlement of its first payment obligation under New Note B (Payment Shares); (c) Ford shall direct the trustee of the Existing Internal VEBA (as defined below) to transfer to the VEBA Trust all assets in the Existing Internal VEBA or cash in an amount equal to the Existing Internal VEBA balance on the date of transfer; and (d) the Mitigation VEBA Committee, or the trustee of the Mitigation VEBA, as directed by the District Court's Order and Final Judgment, is required to transfer all assets and liabilities of the Mitigation VEBA to the VEBA Trust.

8. The TAA and the LLC

Ford created the TAA under the 2008 Settlement Agreement to serve as tangible evidence of the availability of Ford assets equal to Ford's obligation to the Ford VEBA Plan. The assets in the TAA, and the investment thereof, are controlled exclusively by Ford and include all investment gains/losses thereon from January 1, 2008, through the date the assets are transferred to the VEBA Trust.

In addition, Ford established Ford-UAW Holdings LLC, a wholly-owned LLC, to hold the assets in the TAA and certain other assets required to be contributed under the 2008 Settlement Agreement, namely (a) a convertible note, issued in April 2008 and due January 1, 2013, with an aggregate principal amount of $3.3 billion bearing 5.75% interest per annum payable semi-annually (the Convertible Note), and (b) a term note, issued in April 2008 and due January 1, 2018 with a principal amount of $3.0 billion bearing 9.50% interest per annum payable semi-annually (the Term Note).

In late 2008, and under the authority granted to it in the 2008 Settlement Agreement, Ford caused the LLC to pay to it $2.282 billion, the value of the assets in the TAA as of December 31, 2008, in exchange for a note with a principal amount of $2.282 billion issued by Ford to the LLC (the TAA Note). The TAA Note has an interest rate of 9% per annum and a maturity date of December 31, 2009. In addition, Ford will repay to the LLC a ''true-up amount,'' calculated according to a formula provided in the note, to reflect a hypothetical investment return on the TAA assets. Since December 31, 2008, Ford has deposited into the TAA $529.1 million representing interest payments on the Convertible Note and Term Note and payments due under the 2008 Settlement Agreement (Base Amount Payments).[11] Ford is also required under the 2008 Settlement Agreement to transfer, as the Committee may request, up to $20 million from the TAA to the VEBA Trust to cover expenses that will

[11] Ford is obligated to make annual ''Base Amount Payments'' of $52.3 million for 15 years to the VEBA Trust under the 2008 Settlement Agreement.

be incurred by the VEBA Trust in anticipation of the Ford VEBA Plan assuming responsibility for payment of benefits for the Class or Covered Group until the Implementation Date. As of July 31, 2009, the cash balance in the TAA was $581.2 million.

As soon as practicable after November 30, 2009 (the Exchange Date), the Convertible Note, the Term Note and the TAA Note will be cancelled and returned to Ford in exchange for Ford's issuance of the New Notes and Warrants to the LLC, and Ford's obligation to make future Base Amount Payments will terminate.

9. New Notes

As described above, under the 2009 Settlement Agreement, the Term Note and Convertible Note, along with the TAA Note and the right to future Base Amount Payments, will be exchanged for the New Notes and Warrants (described in more detail below). The aggregate principal amount of the New Notes and the amortization thereof represents the equivalent value of (a) the principal amounts of and interest payments on the Term Note, the Convertible Note and the TAA Note; (b) any unpaid Base Amount Payments; and (c) an additional $25 million per year during the period 2009 through 2018, which is intended to cover transaction costs the Ford VEBA Plan incurs in selling any shares of Ford Common Stock delivered pursuant to Ford's exercise of the stock settlement option under New Note B.[12]

Unless Ford elects to prepay the amounts due under the New Note, the payment schedule under the New Notes will be as set forth below:

Payment date	Payment of note A (million)	Payment of note B (million)
December 31, 2009	$1,268.47	$609.95
June 30, 2010	290	609.95
June 30, 2011	290	609.95
June 30, 2012	679	654
June 30, 2013	679	654
June 30, 2014	679	654
June 30, 2015	679	654
June 30, 2016	679	654
June 30, 2017	679	654
June 30, 2018	679	654
June 30, 2019	26	26
June 30, 2020	26	26
June 30, 2021	26	26
June 30, 2022	26	26

a. Key Terms of New Note A

New Note A is a $6,705,470,000 amortizing guaranteed secured note maturing June 30, 2022. It does not bear interest except in the event of a default in a scheduled payment. Payments are to be made in cash, in annual installments from 2009 through 2022. The initial payment of approximately $1.2 billion, due December 31, 2009, is significantly larger than the subsequent payments, in order to provide the VEBA Trust with funds from which to operate and pay benefits under the Ford VEBA Plan.

New Note A is designated as Primary Second Lien Debt and Second Priority Additional Debt in accordance with, and subject to, the terms of a certain Credit Agreement dated December 15, 2006 with JPMorgan Chase Bank (the 2006 Credit Agreement).[13] As such, up to approximately $1.5 billion of the principal payments made under New Note A, and any interest from overdue principal payments, are secured on a second lien basis with the collateral pledged under the 2006 Credit Agreement. Upon satisfaction of certain conditions, this second lien security interest is partially reduced in 2017 and terminated fully in 2018. New Note A is also guaranteed, subject to certain conditions. It will be endorsed with an unconditional guaranty of payment issued by certain direct and indirect wholly-owned Ford subsidiaries (the Subsidiary Guarantors).[14]

New Note A is transferable, subject to limited restrictions. It may not be reoffered, sold, assigned, transferred, pledged, encumbered or otherwise disposed of by the holder except (a) to the VEBA Trust pursuant to the 2009 Settlement Agreement, (b) to Ford or a subsidiary thereof, (c) pursuant to a Ford registration statement that has become effective under the Securities Act of 1933, as amended, (the Securities Act) or (d) pursuant to an exemption from registration provided by Rule 144 under the Securities Act or any other available exemption from the registration requirements of the Securities Act.

However, the VEBA Trust may assign or transfer all or any portion of New Note A provided that (a) the amount of the assignment or transfer must at least be in an initial principal amount of $250,000,000, or if in excess thereof in an initial principal amount of a multiple of $100,000,000; (b) the assignment or transfer is not in violation of applicable law; (c) Ford and its Subsidiary Guarantors receive a written agreement from the assignee or transferee to undertake the representations, warranties and covenants of the holder included in the Securities Exchange Agreement; and (d) sufficient notice and evidence of compliance with the transfer or assignment conditions is given to Ford.[15]

b. Key Terms of New Note B

New Note B is a $6,511,850,000 amortizing guaranteed secured note maturing June 30, 2022. It does not bear

[12] Each of New Note A and New Note B represents approximately 50% of Ford's overall funding obligation under the 2008 Settlement Agreement.

[13] It is anticipated that the LLC, as holder of the New Notes (upon their issuance), will enter into an Intercreditor Agreement that will set forth certain priority provisions between the LLC and other second lien lenders.

[14] The Applicant represents that the Ford VEBA Plan will pay no fees to the Subsidiary Guarantors in return for their guaranty of the New Notes. Therefore, the Applicant asserts that although the guarantees are a prohibited extension of credit between the Ford VEBA Plan and parties in interest, such guarantees are covered by the class exemption granting relief for an interest free loan between a plan and a party in interest. PTE 80–26, as amended (71 FR 17917 (April 7, 2006)) (Interest-Free Loans). In the Department's view, relief under PTE 80–26 would be available for the guarantees provided the conditions of that exemption are satisfied.

[15] See Section 5 of the Securities Exchange Agreement.

interest except in the event of a default in a scheduled payment. The initial principal amount is to be repaid according to the agreed-upon schedule of fourteen annual payments set forth above with an initial payment date on December 31, 2009.

New Note B is also designated as Primary Second Lien Debt and Second Priority Additional Debt in accordance with, and subject to, the terms of the 2006 Credit Agreement. As such, up to approximately $1.5 billion of the principal payments made under New Note B, and any interest from overdue principal payments, are secured on a second lien basis with the collateral pledged under the 2006 Credit Agreement. Upon the satisfaction of certain conditions, this second lien security interest is partially reduced in 2017 and terminated in its entirety 2018. Additionally, New Note B is guaranteed in accordance with substantially identical terms as are described above for New Note A.[16]

On each New Note B payment date, subject to satisfaction of all of the Stock Settlement Conditions (described below), Ford has the option to settle any or all of the amount due with respect to New Note B with Ford Common Stock designated as ''Payment Shares'' of equal value, determined based on the volume-weighted average selling price per share of Ford Common Stock for the 30 trading-day period ending on the second business day prior to the relevant payment date. Such Payment Shares will be subject to certain registration rights and transfer restrictions, as described herein.

Ford's option to settle any or all portion of the amounts due with respect to New Note B by delivering Payment Shares is subject in each instance to the satisfaction of the following Stock Settlement Conditions on the applicable payment date:

1. No event of default has occurred under Ford's outstanding public debt securities, bank credit facilities, or notes or other securities issued to the VEBA Trust, and Ford has paid all amounts due on or prior to such payment date on New Note A and New Note B (in cash, or through the exercise of the stock payment option with respect to any payment or portion thereof or the deferral of any payment or portion thereof as described below, as applicable);

2. No bankruptcy or insolvency proceeding has been commenced by or against Ford;

3. Ford has made no assignment for benefit of creditors or admission of general inability to pay debts;

4. Ford Common Stock is listed on the New York Stock Exchange (NYSE) or other national securities exchange on the payment date, and the NYSE (or such other securities exchange) has not commenced or provided notice of the commencement of any delisting proceedings or inquiries on or prior to the payment date;

5. No judgment in excess of a specified amount has remained unsatisfied and unstayed for more than 30 days;

6. No ''termination event'' (as defined by ERISA) has occurred with respect to either of Ford's two major U.S. defined benefit pension plans;

7. Ford has received no audit opinion containing a going concern explanatory paragraph for the fiscal year immediately preceding the applicable payment date; and

8. The price per share of Ford Common Stock is greater than $1.00 (subject to customary anti-dilution adjustments).

Furthermore, if on any payment date under New Note B, conditions 1., 2., 3., 5., and 6. are met, then, subject to certain limitations, Ford would generally have the right to defer such payment by paying it in up to five equal annual installments beginning with the next scheduled payment date, with interest accruing at 9% beginning on the date such payment was originally due and continuing through the date such payment is made. Thus, Ford may make such payment (or installment thereof) in common stock on any deferred installment date if all the conditions for payment in common stock have been met on such date.

c. Department's Concerns Regarding New Note B

The Department raised the issue of Ford's discretion under New Note B with Ford, the UAW, and Class Counsel and received the unanimous response that the terms would not unduly disadvantage participants or beneficiaries of the VEBA Trust. The Applicant asserted that, although the Payment Shares will initially be unregistered, the VEBA Trust will likely be able to sell the shares with minimal delay, thus the difference in price between the unregistered Payment Shares and publicly traded Ford Common Stock would be negligible.[17] Furthermore, under the terms of New Note A, the VEBA Trust will receive an additional payment in each year intended to compensate the VEBA Trust for any transaction costs of selling Payment Shares and any short term risk due to stock price volatility.

In addition, the Applicant, the UAW, and Class Counsel maintained that, although Ford would have the unilateral option to defer its payment obligations under New Note B, there would be sufficient conditions present to prevent such option from being abused. Furthermore, according to the UAW and Class Counsel, the terms of the settlement agreement(s) were heavily negotiated by all parties to the transactions, and the formula selected to calculate the amount of Payment Shares payable on a payment date under New Note B provides protection for the VEBA Trust from short-term aberrant trading movements and is a fairly standard method of measuring the value of a stock-settled convertible instrument trading in the marketplace.[18]

The Department takes note of the fact that the 2009 Settlement Agreement was negotiated by the responsible parties, including the UAW and Class Counsel, who believed that it represented the best alternative that could be achieved under difficult circumstances.

10. Other Important Terms Common to the New Notes

Ford may prepay in cash either or both of the New Notes in whole or in part. For prepayments in whole, the payment on each Payment Date shall equal the corresponding amounts set forth as a schedule to the applicable New Note. In the event of any partial prepayment, future payments shall be determined, subject to the VEBA Trust's review and confirmation, on a basis that provides the economically equivalent present value and duration to the VEBA Trust using a discount rate of 9% per annum.

Furthermore, each payment under the New Notes will be deemed a payment of principal. Any payment not made, in addition to any default implications, earns interest at an annual rate of 9% per annum, plus a default premium of 2% per annum from the due date to the date of payment.

11. Warrants

Ford will issue Warrants to acquire 362,391,305 shares of Ford Common Stock at a strike price of $9.20 per share. The Warrants expire on January 1, 2013.

[16] See Footnote 14 regarding the applicability of PTE 80–26.

[17] Section 5.01 of the Securityholder and Registration Rights Agreement by and among Ford and Ford-UAW Holdings LLC, effective as of November 9, 2009 (the Securityholder and Registration Rights Agreement), obligates Ford to establish a shelf registration as soon as possible following the delivery of the New Notes. Since Ford is a well-known seasoned issuer for purposes of the Securities Exchange Act, the shelf registration should be effective immediately upon filing, allowing the VEBA Trust to sell shares immediately following their receipt. In addition, the VEBA Trust has certain other piggyback registration rights, rights under Rule 144 and 144A, and block sales rights as well, subject to various restrictions designed to protect Ford from dilution of its stock at a time when its stock price is already low.

[18] See pages 1–2 of ''UAW Response to Department of Labor Questions on New Note B: Statement in Support of Prohibited Transaction Exemption Application of Ford Motor Company,'' submitted July 24, 2009.

The exercise price and terms of the Warrants are similar to the conversion price and the conversion rights in the Convertible Note provided under the 2008 Settlement Agreement, and are intended to preserve to the Ford VEBA Plan the option value embedded in the Convertible Note by allowing the Ford VEBA Plan to benefit from any appreciation of Ford's common stock above the exercise price to the same extent it would have under the Convertible Note. The exercise price of the Warrants is subject to adjustment according to the terms of the Warrant Agreement, including as the result of share split, share combination, certain dividends or distributions and certain tender offers.

The Warrants are subject to a restriction on transfer, in that they may not be reoffered, sold, assigned, transferred, pledged, encumbered, or otherwise disposed of by a Warrantholder except (a) in compliance with applicable transfer restrictions, if any, set forth in Section 2.2 of the Securityholder and Registration Rights Agreement, and (b)(i) to Ford or a subsidiary thereof, (ii) pursuant to a Ford registration statement that has become effective under the Securities Act, or (iii) pursuant to an exemption from the registration requirements of the Securities Act, including Rule 144 under the Securities Act.

Shares of Ford Common Stock received by the Ford VEBA Plan upon exercise of all or a portion of the Warrants are also subject to restrictions on resale under the Securityholder and Registration Rights Agreement as described further below. In addition, the shares may not be reoffered, sold, assigned, transferred, pledged, encumbered, or otherwise disposed of except (a) prior to October 1, 2012 if the closing sale price of the common stock was greater than 120% of the then current exercise price for at least 20 trading days in the 30 consecutive trading days ending on the last trading day of the preceding calendar quarter or (b)(i) to Ford or its subsidiary, (ii) pursuant to a Ford registration statement that has become effective under the Securities Act, or (iii) pursuant to an exemption from the registration requirements of the Securities Act, including Rule 144 under the Securities Act. Any shares of common stock as to which the transfer restrictions have expired may be freely sold without limits.

In addition, Warrantholders will not be entitled by virtue of holding Warrants to vote, consent, receive dividends, or exercise any right whatsoever of a Ford stockholder unless such Warrantholders become holders of record of the underlying shares of Ford common stock.

12. Rights and Restrictions Under the Securityholder and Registration Rights Agreement

Under the 2009 Settlement Agreement, the Payment Shares, Warrants, and Ford Common Stock issued as a result of the exercise of Warrants, as well as any Ford Common Stock sold in connection with any hedging transaction undertaken by the Ford VEBA Plan, have certain registration rights and are subject to customary limitations and restrictions on transfer, that are described below.

a. Registration Rights

Under the Securityholder and Registration Rights Agreement, the VEBA Trust is limited to two shelf takedown or demand registrations per year, and certain piggyback registration rights, including limitations on the aggregate sale of shares per quarter and year of 250 million shares and 500 million shares respectively. Additionally, the VEBA Trust is subject to certain restrictions with respect to Rule 144 and 144A sales and block sales of Ford Common Stock, that are designed to minimize dilution or disruption to the voting power, of Ford Common Stock.

b. Indemnification Rights and Obligations

In addition, under the Securityholder and Registration Rights Agreement, the VEBA Trust, on behalf of the Ford VEBA Plan, and Ford may be required to indemnify the other party for certain losses related to an offering of any shares of Ford Common Stock that are issued or issuable, as the case may be, upon settlement of New Note B or exercise of the Warrants (Registrable Instruments). In general, Ford has agreed to indemnify the VEBA Trust, on behalf of the Ford VEBA Plan, to the extent it is a holder of any such Securities for all losses arising out of or caused by any untrue statement or alleged untrue statement of a material fact contained in any registration statement or offering document, subject to the terms and conditions of the agreement. Similarly, the VEBA Trust, on behalf of the Ford VEBA Plan, as a holder of the Securities, has agreed to indemnify and hold Ford harmless for any losses arising out of or caused by an untrue statement or omission included or omitted in any registration statement or offering document based on information furnished in writing by the VEBA Trust.

The VEBA Trust, on behalf of the Ford VEBA Plan, may also be subject to a repayment obligation under the Securityholder and Registration Rights Agreement in the event that the Independent Fiduciary determines to withdraw any Registrable Instruments from any ''Shelf Offering'' or ''Demand Offering'' after having delivered notice to Ford of its intent to effect an offering of all or part of the Registrable Instruments. Among other requirements, the VEBA Trust must reimburse Ford for all reasonable out-of-pocket fees and expenses incurred in the preparation, filing and processing of the withdrawn registration in order for the withdrawn request not to be deemed an offering and counted against the offering limits provided in such agreement.

The Applicant has requested exemptive relief from section 406(a)(1)(D) of ERISA for these indemnification and reimbursement obligations to the extent that the Ford VEBA Plan is a holder of the relevant Securities and the payment obligations are triggered. Alternatively, the Applicant asserts that Ford's performance of its contractual obligations under the Securityholder and Registration Rights Agreement may be a ''service'' rendered to the VEBA Trust, and that the reimbursement of certain costs is ''reasonable compensation'' for such service, such that the statutory exemption of section 408(b)(2) of ERISA applies to exempt any such reimbursement from the prohibitions under section 406(a)(1) of ERISA, and the performance of such service from the prohibitions under section 406(a)(1)(C) of ERISA.

The Department is not proposing any relief in connection with the Ford VEBA Plan's obligation to (a) indemnify and hold Ford harmless for losses arising out of or caused by an untrue statement or omission in any registration statement or offering document based on information furnished in writing by the VEBA Trust, or (b) reimburse Ford in the event that the Independent Fiduciary determines to withdraw any Registrable Instruments from a ''Shelf Offering'' or ''Demand Offering'' after having delivered notice to Ford of its intent to effect such an offering.

It appears to the Department that the only representation that the VEBA Trust could make to Ford for purposes of a registration statement or offering document is that it holds the Registrable Instruments free and clear from any liens.[19] Thus, it seems unlikely that the

[19] In discussions with the Department, the Applicant was hard-pressed to point out any factual

Continued

Ford VEBA Plan will have to indemnify Ford pursuant to this obligation. ERISA section 408(b)(2) may provide relief for reasonable amounts paid to Ford if the Independent Fiduciary withdraws any Registrable Instruments from an offering after it has announced its intentions to effect such offering and Ford has incurred costs as a result of the Independent Fiduciary's decision. Ultimately it would be the responsibility of the Committee to determine whether the services provided by Ford satisfy all of the conditions set forth in the statutory exemption and pertinent regulations.

c. Right of Ford To Purchase Securities

Ford also retains the right, under the Securityholder and Registration Rights Agreement, to make an offer to purchase certain Securities that the VEBA Trust intends to transfer to third parties. If at any time the Independent Fiduciary proposes to transfer any Warrants, Payment Shares or shares of Ford Common Stock received upon the exercise of all or a portion of the Warrants, subject to certain exceptions, Ford will have an option for ten days, after receiving notice of such intended sale, to offer to purchase all or any portion of the Securities proposed to be transferred (the ''Right of First Offer''). After receiving Ford's offer, the VEBA Trust will have ten days to accept the offer. If the VEBA Trust does not accept Ford's offer, it may transfer such Securities, subject to the other terms of the Securityholder and Registration Rights Agreement, to a purchaser on terms and conditions that are not less favorable to the VEBA Trust (and no more favorable to the purchaser) than those outlined in Ford's offer, provided that the transfer is completed within one hundred twenty (120) days after notice was provided to Ford.

d. Hedging

The Applicant represents that hedging is generally permitted only on Payment Shares received by the VEBA Trust prior to such hedging and with respect to no more than 25% of the Payment Shares deliverable by Ford on the next succeeding payment date, subject to satisfaction of the Stock Settlement Conditions, in a manner consistent with the then-existing registration rights agreement and sales and time limitations.

situations that would trigger the VEBA Trust's indemnification and reimbursement obligations to Ford.

13. Existing Internal VEBA

The Existing Internal VEBA is the subaccount of the Ford-UAW Benefits Trust that is maintained by Ford as a source of funding for retiree health care expenses. As of December 31, 2008, the Existing Internal VEBA had an estimated asset value of approximately $2.7 billion.

Until the Existing Internal VEBA is transferred to the VEBA Trust, the assets will continue to be invested in a manner consistent with its investment policy, as may be amended from time to time. Within 10 business days after the Implementation Date, Ford will direct the trustee of the Existing Internal VEBA to transfer to the VEBA Trust all assets in the Existing Internal VEBA or cash in an amount equal to the Existing Internal VEBA balance on the date of the transfer. As described further below, the Existing Internal VEBA will retain an amount equal to the Existing Internal VEBA's share of expenses (to the extent permitted by ERISA) subject to reconciliation with actual expenses incurred.

14. Mitigation VEBA

The Mitigation VEBA was created in connection with the 2008 Settlement Agreement. Ford submitted an initial application for an individual prohibited transaction exemption relating to the Mitigation VEBA on November 27, 2007.[20] The Mitigation VEBA is intended to be a source of ''mitigation'' payments to Ford UAW retirees to lessen the impact of the new cost-sharing provisions implemented under the 2008 Settlement Agreement. As of December 31, 2008, the Mitigation VEBA had an estimated asset value of $54.4 million. Until the assets and liabilities of the Mitigation VEBA are transferred to the VEBA Trust for the benefit of the Ford VEBA Plan, its value will be affected by certain additional contributions, investment returns and mitigation expenses and payments. The balance of the Mitigation VEBA is to be transferred to the VEBA Trust within 15 days after the Implementation Date. After transfer of the assets, the Mitigation VEBA will be terminated.

15. Covered Transactions

Generally, the Applicant seeks exemptive relief for three sets of transactions. The first set of transactions involves the acquisition, holding, and disposition of the employer securities described above by the Ford VEBA Plan. The second set relates to the exercise by Ford or the Ford VEBA Plan of certain rights and obligations pursuant to the Securityholder and Registration Rights Agreement. Finally, the third set of transactions involves those transactions between Ford and the Ford VEBA Plan that may occur as a result of the transition of responsibility to provide benefits from Ford to the Ford VEBA Plan under the 2009 Settlement Agreement, such as possible extensions of credit, reimbursement of expenses, or the mistaken deposits of assets into the Ford VEBA Plan.

With respect to the three sets of transactions described above, the Applicant states that the transactions provide the only feasible method of funding health care benefits for retirees and their beneficiaries while preserving the financial health of Ford. The UAW and Class Counsel have joined in supporting this request for exemptive relief described fully herein.

a. Acquisition, Holding, and Disposition of Ford Securities

(1) LLC Interests, New Note A, New Note B and the Warrants

The Applicant requests exemptive relief from sections 406(a)(1)(E), 406(a)(2), and 407(a) of ERISA for the acquisition and holding by the Ford VEBA Plan of the LLC Interests. Additionally, because New Note A, New Note B and the Warrants will be held by the LLC at the time the LLC Interests are transferred, the Applicant also requests relief for the indirect acquisition and holding of the New Notes and Warrants by the Ford VEBA Plan. Alternatively, if Ford determines not to transfer the LLC Interests to the VEBA Trust and instead elects to transfer the New Notes and the Warrants directly, the Applicant requests relief from sections 406(a)(1)(E), 406(a)(2), and 407(a) for the direct acquisition and holding of such Securities by the Ford VEBA Plan.

Section 406(a)(1)(E) prohibits a fiduciary from causing a plan to engage in a transaction, if he knows or should know that such transaction constitutes the direct or indirect acquisition, on behalf of a plan, of any employer security in violation of section 407(a). Section 406(a)(2) prohibits a fiduciary who has authority or discretion to control or manage the assets of a plan from permitting the plan to hold any employer security if he knows or should know that holding such security violates section 407(a).

Section 407(a)(1) states that a plan may not acquire or hold any ''employer security'' that is not a ''qualifying

[20] The Mitigation VEBA is the subject of Prohibited Transaction Exemption 2009–28, 74 FR 49038 (September 25, 2009), which provided relief for certain cash advances and ''true ups'' between Ford and the Mitigation VEBA related to administration of such VEBA.

employer security.'' Section 407(a)(2) states that a plan may not acquire any qualifying employer security (or ''qualifying employer real property'') if immediately after such acquisition the aggregate fair market value of employer securities (and ''employer real property'') held by the plan exceeds 10 percent of the fair market value of the assets of the plan.

Section 407(d)(5) of ERISA defines a ''qualifying employer security'' as an employer security that is either (i) stock, (ii) a marketable obligation (as defined by section 407(e) of ERISA), or (iii) an interest in certain publicly traded partnerships. Furthermore, a ''marketable obligation'' is defined, in part, under section 407(e) of ERISA as a ''bond, debenture, note, or certificate, or other evidence of indebtedness'' if immediate following the acquisition of such obligation, not more than 25% of the aggregate amount of obligations issued in such issue and outstanding at the time of acquisition is held by the plan; and at least 50% of the aggregate amount of such obligations in such issue is held by persons independent of the issuer. Lastly, section 407(e) of ERISA requires that immediately following the acquisition of the obligation by the plan, not more than 25% of the assets of the plan are invested in obligations of the employer or an affiliate of the employer.

According to the Applicant, each of the LLC Interests, the New Notes and the Warrants represent a ''security'' under section 3(20) of ERISA. The Applicant contends that, at the time of the VEBA Trust's acquisition of the LLC Interests, the LLC Interests will be ''employer securities'' under section 407(d)(1) of ERISA because immediately prior to the transfer, the LLC is a wholly-owned subsidiary and an affiliate of Ford.[21] However, after the acquisition has been completed, the LLC will cease being an affiliate of Ford, and the LLC Interests will no longer be ''employer securities'' with respect to the VEBA Trust.[22] Further, the Applicant notes that the LLC Interests cannot be ''qualifying employer securities'' at the time they are transferred, because they do not constitute stock, marketable obligations, or interests in a publicly traded partnership, for purposes of section 407(d)(5) of ERISA.

In addition, the New Notes will not be ''qualifying employer securities'' as defined under ERISA section 407(d)(5) at the time of their direct or indirect acquisition by the VEBA Trust, because neither New Note is a marketable obligation. In this regard, upon the direct or indirect transfer to the VEBA Trust, it is expected that the VEBA Trust will hold 100% of each New Note issued and outstanding in violation of section 407(a). Thus, neither of the New Notes will constitute a ''qualifying employer security'' at the time they are acquired by the VEBA Trust.

Moreover, noting the Department's position in Advisory Opinion Letter 94–31A, the Applicant contends that the Warrants are not qualifying employer securities, because they are neither stock nor marketable obligations under section 407(d)(5) of ERISA.[23]

Moreover, the Applicants note that even if the LLC Interests, the Warrants, and the New Notes are considered qualifying employer securities, the aggregate fair market value of employer securities held by the Ford VEBA Plan will exceed the 10 percent limitation in section 407(a)(2) of ERISA.

Furthermore, the Department is proposing exemptive relief from section 406(a)(1)(A), 406(b)(1), and 406(b)(2) in the event that the Securities, including the LLC Interests, are disposed of in a transaction with a party in interest.

(2) Ford Common Stock

The Applicant requests relief from the provisions of sections 406(a)(1)(E), 406(a)(2) and 407(a) of ERISA for the Ford VEBA Plan's acquisition or holding of Payment Shares or any Ford Common Stock acquired pursuant to the exercise of all or a portion of the Warrants, as the aggregate fair market value of qualifying employer securities held by the VEBA Trust may exceed the 10 percent limitation in section 407(a)(2) of ERISA (as described above), resulting in a violation of sections 406(a)(1)(E) and 406(a)(2) of ERISA.

The Applicant asserts that, depending on numerous factors at the time of receipt of Payment Shares or upon the exercise or all or any portion of the Warrants, such as the price of the Ford Common Stock, the investment performance of the Ford VEBA Plan's assets, and the number of claims filed under the Ford VEBA Plan, Ford employer securities held by the VEBA Trust may exceed 10 percent of the fair market value of the assets of the Ford VEBA Plan.

In addition, the Applicant is concerned that Ford Common Stock may cease to be ''qualifying employer securities'' as defined under ERISA section 407(d)(5) at one or more times over the life of Note B, because such stock may exceed the limitation described in section 407(f)(1) of ERISA. Section 407(f)(1) of ERISA provides that an employer security constitutes a qualifying employer security only if ''(A) no more than 25% of the aggregate amount of stock of the same class issued and outstanding at the time of acquisition is held by the plan, and (B) at least 50% of the aggregate amount referred to in subparagraph (A) is held by persons independent of the issuer.'' According to the Applicant, the VEBA Trust, through a combination of holdings of Ford Common Stock, Ford's payment of Ford Common Stock in satisfaction of its obligations under New Note B, and the exercise of the Warrants, may hold more than 25% of the outstanding common shares of Ford. If so, Ford Common Stock held by the VEBA Trust would no longer satisfy the requirements of section 407(f)(1). The Applicant therefore seeks exemptive relief for the VEBA Trust's acquisition and holding of Ford Common Stock acquired through the receipt of Payment Shares or upon the exercise of all or a portion of the Warrants, to the extent such shares cease to be qualifying employer securities at one or more times over the life of New Note B.

The Applicant also expressed concern that the Department may take the view that the Payment Shares and shares received upon exercise of the Warrants constitute a separate class of stock due to the transfer restrictions applicable to them. As a result, Ford requests relief from section 407(a) of ERISA for each tranche of stock in the transaction.

Furthermore, the Department is proposing relief from section 406(a)(1)(A), 406(b)(1), and 406(b)(2) of ERISA in the event that the Ford Common Stock is disposed of in a transaction with a party in interest.

(3) Extensions of Credit

The Applicant seeks relief from sections 406(a)(1)(B) and 406(b)(1) for the Ford VEBA Plan's direct or indirect acquisition of the New Notes, and with

[21] Section 407(d)(7) defines the term ''affiliate'' for purposes of identifying employer securities. It provides, in part, that:

''[A] corporation is an affiliate of an employer if it is a member of any controlled group of corporations (as defined in section 1563(a) of the Internal Revenue Code of 1986, except that 'applicable percentage' shall be substituted for '80 percent' whenever the latter percentage appears in such section) of which the employer who maintains the plan is a member. For purposes of the preceding sentence, the term 'applicable percentage' means 50 percent. * * * ''

[22] See DOL Opinion Letter 2003–14A (October 8, 2003) (securities ceased being ''employer securities'' immediately following the completion of an exchange of securities in which affiliate status of the issuing company was terminated).

[23] See DOL Advisory Opinion Letter 94–31A n.4 (September 9, 1994) (''In the Department's view, warrants to purchase employer securities generally would not constitute 'qualifying employer securities' under section 407(d)(5) of ERISA since they are neither stock nor marketable obligations.'').

respect to Ford's deferral option under New Note B. Section 406(a)(1)(B) prohibits a fiduciary from causing a plan to engage in a transaction if he knows or should know that such transaction constitutes a direct or indirect lending of money or other extension of credit between a plan and a party in interest.

The New Notes constitute an extension of credit between the Ford VEBA Plan and Ford, a party in interest. In addition, if Ford has satisfied certain of the conditions necessary for the settlement of New Note B in Payment Shares (see Key Terms of New Note B, supra.), then Ford may also have the right under New Note B to defer such payment and instead pay it over five years, with 9% interest. If Ford is in compliance with all of the settlement conditions, Ford may have the right to pay such deferred payment in Payment Shares, and if Ford has only satisfied certain of the settlement conditions, Ford must contribute cash. Because the deferred contribution can be paid in five equal annual installments, the deferral of a payment is tantamount to an extension of credit from the Ford VEBA Plan to Ford in the amount of the deferred payment.

(4) Ford's Deposits and Remittances

The Applicant also seeks relief for Ford's deposits to the Ford VEBA Plan, and for the sale of Ford Common Stock to the Ford VEBA Plan pursuant to the Independent Fiduciary's exercise of the Warrants, in the event that any such contribution is deemed to be a ''sale or exchange'' of property between a plan and a party in interest in violation of section 406(a)(1)(A) of ERISA. The Applicant believes that Ford's contribution to the Ford VEBA Plan of the Securities could be deemed to reduce an obligation that Ford would otherwise have to the participants and beneficiaries of the Ford VEBA Plan.[24] In addition, because the Independent Fiduciary's exercise of the Warrants on behalf of the Ford VEBA Plan would take the form of a ''sale'' of property (i.e., Ford Common Stock) to a plan from a party in interest in violation of section 406(a)(1)(A), the Applicant seeks relief for this transaction.

b. Exercise of Certain Rights and Obligations Pursuant to the Securityholder and Registration Rights Agreement

(1) Right of First Offer or Self Tender

The Applicant seeks relief from section 406(a)(1)(A) for the purchase of certain Securities pursuant to Ford's ''Right of First Offer'' under the Securityholder and Registration Rights Agreement. Under the agreement, Ford may purchase certain Securities, including Payment Shares or Warrants, that the VEBA Trust intends to transfer to third parties in accordance with the Right of First Offer or a Ford self-tender. Section 406(a)(1)(A) of ERISA prohibits a fiduciary from causing a plan to engage in a transaction if he knows or should know that such transaction constitutes a direct or indirect sale or exchange, or leasing, of any property between the plan and a party in interest, except as provided in section 408 of ERISA.

Section 408(e) of ERISA provides, in part, that the prohibitions of sections 406 and 407 shall not apply to the sale by a plan of ''qualifying employer securities'' if such sale is (A) for adequate consideration and (B) no commission is charged with respect thereto.

The Applicant states that section 408(e) of ERISA may be inapplicable to the sale of Ford Common Stock by the VEBA Trust to Ford pursuant to its Right of First Offer, because, as described above, the shares of Ford Common Stock to be sold to Ford may be deemed not to constitute ''qualifying employer securities'' at the time of such sale by the VEBA Trust. In addition, the Applicant notes that section 408(e) of ERISA will not provide relief from the prohibitions under section 406 of ERISA for the sale of Warrants pursuant to Ford's Right of First Offer, because the Applicant does not believe the Warrants constitute ''qualifying employer securities.''

c. Transition Payments and Mistaken Deposits

(1) Mispayment of Benefits and Reimbursements

Prior to the Implementation Date, Ford and the Existing Internal VEBA will bear responsibility for the payment of benefits under the Ford Retiree Health Plan to members of the Covered Class and the Covered Group who ultimately will be covered by the Ford VEBA Plan. The Ford VEBA Plan will have sole responsibility and be the exclusive source of funds for the payment of retiree medical benefits to the Class and Covered Group, with respect to benefit claims incurred after the Implementation Date.

Under certain circumstances related to the transition, Ford, the Ford Retiree Health Plan, and the Ford VEBA Plan may extend credit or transfer plan assets to each other in order to pay benefit claims that are the legal responsibility of one of the other aforementioned parties (such other party, the Responsible Party). The Applicant asserts that mispayments and reimbursements are likely to occur in the normal course of operation due to the administrative realities of health care payments and the shifting of plan responsibilities between multiple plans in a short period of time.

The following is an example of a transaction that would require relief under the requested exemption. A member of the Covered Group receives medical care on December 28, 2009, thereby incurring a claim under the Ford Retiree Health Plan. However, in April of 2010, the claim is presented to and paid by the Ford VEBA Plan. The Ford VEBA Plan would be reimbursed by the Ford Retiree Health Plan.

In such event, the Responsible Party will reimburse the payor for such benefits, plus interest. The Applicant contends that payment by an entity of benefits for claims incurred after benefit responsibility has been transferred to the Responsible Party constitutes an extension of credit between such entity and the Responsible Party that is prohibited under section 406(a)(1)(B). Payment by the Responsible Party to such entity as reimbursement for these paid claims constitutes a transfer of plan assets to a party in interest that is prohibited under 406(a)(1)(D).

(2) True-Ups for TAA Expense Accruals

The Applicant seeks relief from sections 406(a)(1)(B) and 406(a)(1)(D) for the payment arrangement established under Section 12.D of the 2009 Settlement Agreement relating to the accrual and subsequent true-up of expenses associated with the TAA through the date of transfer of the TAA assets. The 2009 Settlement Agreement provides that the TAA or Ford, as applicable, will accrue and retain an amount representing pre-transfer TAA expenses. After payment of the actual expenses, the accrual and actual expenses will be reconciled. If there has been an underaccrual, the VEBA Trust is obligated to return the amount of the underaccrual to the TAA or Ford, as applicable. If there has been an overaccrual, the TAA or Ford, as applicable, will transfer the amount of

[24] In *Commissioner* v. *Keystone Consolidated Industries,* 508 US 152 (1993), the Supreme Court held that an employer's contribution of property in satisfaction of the plan's funding obligation was a ''sale or exchange'' for purposes of 4975(c)(1)(A) of the Code, 26 USC 4975(c)(1)(A). Moreover, the Department has held that an in-kind contribution to a plan constitutes a prohibited transaction if the contribution reduces an obligation of a plan sponsor or employer to make a cash contribution to the plan. *See* Interpretive Bulletin 94–3, 29 CFR 2509.94–3(c).

the overaccrual to the VEBA Trust. Since the TAA is currently held by the LLC and it is anticipated that Ford will transfer its entire interest in the LLC to the VEBA Trust on the Implementation Date, it is expected that any overaccrual or underaccrual of pre-transfer expenses relating to the TAA will be paid to and from Ford.

Since Ford is a party in interest to the Ford VEBA Plan, the transfer of an amount of assets of the Ford VEBA Plan from the VEBA Trust to Ford for any underaccrual constitutes the use of plan assets by or for the benefit of a party in interest in violation of section 406(a)(1)(D) of ERISA. Similarly, Ford's overaccrual and retention of cash after the Implementation Date constitutes the use of plan assets by or for the benefit of a party in interest. Moreover, the overaccrual or underaccrual and subsequent reimbursement payment between Ford and the VEBA Trust constitutes a prohibited extension of credit between the plan and a party in interest in violation of section 406(a)(1)(B) of ERISA.

Similarly, Section 12.B of the 2009 Settlement Agreement provides that within 10 business days after the Implementation Date, Ford will direct the trustee of the Existing Internal VEBA to transfer to the VEBA Trust all assets in the Existing Internal VEBA or cash in an amount equal to the Existing Internal VEBA balance on the date of the transfer. The agreement provides that an amount for trust expenses (to the extent permitted by ERISA) through the date of transfer will be accrued and retained within the Existing Internal VEBA to pay the expenses. Subsequently, a reconciliation of the accruals and the actual expenses will be performed. Any overaccrual of expenses will be paid to the VEBA Trust on behalf of the Ford VEBA Plan. The VEBA Trust will return any underaccrual to the Existing Internal VEBA.

(3) Mistaken Payments or Deposits

The Applicant likewise seeks relief from section 406(a)(1)(D) of ERISA for return of mistaken payments to the Ford VEBA Plan, with interest.

Under the last paragraph of Section 12 of the 2009 Settlement Agreement, any deposit made to the Ford VEBA Plan by mistake will be returned (with earnings) within 30 days of notice to the Committee of the mistake, to the extent permitted by law. The Applicant is concerned that this could be viewed as involving a prohibited transfer of plan assets to a party in interest. Accordingly, the Applicant requests exemptive relief for this transaction.

16. Conditions Related to the Transfer of Ford Securities to the Ford VEBA Plan: The Independent Fiduciary

Pursuant to the Trust Agreement, the Committee will appoint an independent fiduciary to manage the Ford Employer Security Sub-Account (the Independent Fiduciary). The Independent Fiduciary will be a ''named fiduciary'' and ''investment manager'' as both terms are defined in ERISA, with complete discretion regarding the holding, ongoing management, and disposition of any Ford security (*i.e.,* the Ford Common Stock, New Notes, Warrants, Payment Shares, and LLC Interests) acquired and held by the Ford VEBA Plan.

The Independent Fiduciary does not have discretion with respect to certain other aspects of the Securities. First, because the Ford VEBA Plan will acquire the Securities by virtue of the 2009 Settlement Agreement, the Independent Fiduciary has no discretion regarding the acquisition of the Securities. Additionally, under the Securityholder and Registration Rights Agreement, the Ford Common Stock held by the VEBA Trust must be voted in the same proportion as votes cast by other stockholders generally, and must always be voted in favor of any amendments to Ford's governing documents proposed in order to facilitate the transactions contemplated by the Securityholder and Registration Rights Agreement. Therefore, the Independent Fiduciary will have no responsibility for the voting of the Ford Common Stock.

The Independent Fiduciary must be independent of and unrelated to Ford, the UAW and the Committee.[25] However, the fiduciary will be deemed not to be independent of and unrelated to Ford, the UAW, the Committee, and their affiliates if (1) such fiduciary directly or indirectly controls, is controlled by, or is under common control with Ford, the UAW, the Committee or their affiliates, (2) such fiduciary directly or indirectly receives any compensation or other consideration from Ford, the UAW or any Committee member in his or her individual capacity in connection with any transaction described in this exemption (except that an Independent Fiduciary may receive compensation from the Committee or the Ford VEBA Plan for services provided to the Ford VEBA Plan in connection with the transactions discussed herein if the amount or payment of such compensation is not contingent upon or in any way affected by the Independent Fiduciary's ultimate decision), or (3) the annual gross revenue received by the fiduciary, in any fiscal year of its engagement, from any of: Ford, the UAW or a member of the Committee in his or her individual capacity, exceeds 3% of the Independent Fiduciary's annual gross revenue from all sources (for federal income tax purposes) for its prior tax year.[26]

The Independent Fiduciary may be removed by the Committee on 30 days written notice only for cause.[27] The

[25] The Department notes that candidates for the position of Independent Fiduciary to the Ford VEBA Plan may be affiliated with entities that provide services to Ford, GM, Chrysler, or their affiliates. It is the responsibility of the Committee to determine whether such affiliations are likely to affect the judgment of the candidate in performing its services as an Independent Fiduciary.

[26] The Department notes that the preceding conditions are not exclusive, and that other circumstances may develop which cause the Independent Fiduciary to be deemed not to be independent of and unrelated to Ford, the UAW, the Committee, and their affiliates.

[27] Cause is defined in the Independent Fiduciary Agreement as: (i) Any disqualifying event described in ERISA section 411; (ii) determination by any court, arbitrator or government regulatory body that the Independent Fiduciary has violated any civil or criminal law (including, but not limited to, securities, antitrust or ERISA) in connection with the performance of its responsibilities to the VEBA Trust (for purposes of avoidance of doubt in connection with this and the subsequent subparagraph, a ''determination'' shall mean any written judgment, order or decree; court-approved settlement; arbitration award; or enforcement action of a government regulatory body or SRO, in the form of a written sanction, claim, demand or opinion, whether or not appealable); (iii) determination by any court, arbitrator or government regulatory body that the Independent Fiduciary has materially breached the terms of its engagement, whether or not appealable; (iv) any action by the Independent Fiduciary that results in imposition of a civil or criminal sanction, any prohibited transaction excise tax, or any civil judgment or award of damages, on the VEBA Trust, the Committee, the trustee, or their respective employees, officers directors or owners (whether or not subject to indemnity by the Independent Fiduciary, an insurer, or any other person); (v) termination, resignation, or death of the Independent Fiduciary principal or officer assigned to serve as the relationship principal with respect to the VEBA Trust, or the inability of such person to perform his or her duties for a continuous period of more than 30 days; (vi) any change of ownership of the Independent Fiduciary that constitutes an ''assignment'' of the Independent Fiduciary's contract with the VEBA Trust, within the meaning of the Investment Advisers Act; (vii) failure of the Independent Fiduciary to qualify as an ''investment manager'' within the meaning of ERISA section 3(38); (viii) any change in the clientele, business or ownership of the Independent Fiduciary that results in an actual conflict of interest; (ix) failure of the Independent Fiduciary to take into account the legitimate needs of the VEBA Trust for liquidity to pay benefits; (x) violation of any conditions imposed on the Independent Fiduciary under the terms of the prohibited transaction exemption issued by the Department; (xi) any other action or inaction of the Independent Fiduciary that the Committee determines to be a material breach of the Independent Fiduciary's agreement or any law, or is likely to result in an irreconcilable conflict; or

Continued

removal will be effective as specified in the written notice, provided that the Independent Fiduciary has been given notice of the appointment of a successor Independent Fiduciary. No successor will be appointed in the event the Ford VEBA Plan ceases to hold any employer security. In the event that the Ford VEBA Plan subsequently acquires or holds an employer security and no appointment of a successor Independent Fiduciary has been made, any court of competent jurisdiction may, upon application by the retiring Independent Fiduciary, appoint a successor after such notice to the Committee and the retiring Independent Fiduciary.

The Committee delegated to a subcommittee (*i.e.,* three Committee members) the responsibility to retain an Independent Fiduciary on behalf of the Ford VEBA Plan. The subcommittee initially determined to proceed with the assumption that the interests of each plan whose assets are held by the VEBA Trust would be best served by seeking to retain a single qualified Independent Fiduciary to represent all three plans (providing health benefits, respectively, to retirees of Chrysler, GM, and Ford). However, the subcommittee recognizes the possibility that engaging multiple Independent Fiduciaries may turn out to be the better option.

The subcommittee intends, as part of the interview process for potential candidates for the Independent Fiduciary appointment, to question the candidates on the nature and likelihood of potential conflicts of interest, the appropriate means of monitoring and communicating actual or potential conflicts, including whether the candidates currently have formal conflict monitoring procedures, and mechanisms for dealing with actual or potential conflicts as they are identified. After reviewing the candidates' qualifications, capacity to represent all three plans, willingness to do so, and other relevant factors, in consultation with counsel, the subcommittee anticipates making a final determination as to whether to hire one Independent Fiduciary or multiple Independent Fiduciaries.

The subcommittee will work with the Independent Fiduciary candidate(s) to develop procedures to identify, minimize and address conflicts of interest as they arise. Specifically, in the event that a single Independent Fiduciary is appointed, the subcommittee will engage a ''conflicts monitor'' to (a) develop a process for identifying potential conflicts, (b) to regularly review the Independent Fiduciary reports, investment banker reports, and public information regarding the companies, to identify the presence of factors that could lead to a conflict, and (c) further question the Independent Fiduciary when appropriate.

Additionally, the subcommittee will be prepared to replace the Independent Fiduciary in the event of an actual and irreconcilable conflict of interest.

Finally, the subcommittee will require the Independent Fiduciary to adopt a written policy regarding conflicts of interest. Such policy will require that, as part of the Independent Fiduciary's periodic reporting to the Committee, the Independent Fiduciary includes a discussion of actual or potential conflicts identified by the Independent Fiduciary and options for avoiding or resolving the conflict.

A separate investment bank will be retained with respect to each of the three plans comprising the VEBA Trust. The investment bank's initial recommendations will be made solely with the goal of maximizing the returns for the single plan that owns the securities for which the investment bank is responsible. If the Independent Fiduciary deviates from such initial recommendations, it would find it necessary to explain why it deviated from a recommendation, and such a deviation may provide a basis for the Committee or its designee to flag possible conflicts of interest in advance. Any contract between the Independent Fiduciary and an investment banker will include an acknowledgement by the investment banker that the investment banker's ultimate client is an ERISA plan.

The Independent Fiduciary will comply with the following additional conditions. The Independent Fiduciary will authorize the Trustee of the Ford VEBA Plan to dispose of Ford Common Stock (including any Payment Shares or shares of Ford Common Stock acquired pursuant to exercise of the Warrants), the New Notes, or exercise the Warrants, only after the Independent Fiduciary determines, at the time of the transaction, that the transaction is feasible, in the interest of the Ford VEBA Plan, and protective of the participants and beneficiaries of the Ford VEBA Plan.

The Independent Fiduciary will negotiate and approve on behalf of the Ford VEBA Plan any transactions between the Ford VEBA Plan and any party in interest involving the Securities that may be necessary in connection with the subject transactions (including but not limited to the registration of Payment Shares, Ford Common Stock received upon exercise of the Warrants, or any Securities contributed to the Ford VEBA Plan).

The Independent Fiduciary will discharge its duties consistent with the terms of the Ford VEBA Plan, the Trust Agreement, the Independent Fiduciary's agreement, and any other documents governing the Securities, such as the Securityholder and Registration Rights Agreement, and any successors to those agreements.

The Ford VEBA Plan may not incur any fees, costs or other charges (other than described in the Trust Agreement and the 2009 Settlement Agreement) as a result of the transactions exempted herein.

The terms of any transaction exempted herein must be no less favorable to the Ford VEBA Plan than the terms negotiated at arms' length under similar circumstances between unrelated parties.

17. Conditions Related to Mispayments of Benefit Claims and Reimbursements

Given the rapidity of the shifts in responsibility from the Ford Retiree Health Plan to the Ford VEBA Plan, a review of mispayments of benefit claims may not be undertaken until at some point following the Implementation Date. The conditions for reimbursements of mispayments require the following procedure for audit and reconciling payments.

The Committee and an independent third party administrator of the Ford VEBA Plan will review benefit payments paid during the transition period and determine the dollar amount of any mispayments made, subject to the review and approval of the VEBA Trust's independent auditor. The results of this review will be made available to Ford.

Ford and the applicable third party administrator of the medical benefits plan maintained by Ford to provide benefits to eligible active hourly employees of Ford and its participating subsidiaries (the Ford Active Health Plan) will perform similar reviews with respect to the amount of mispayments made. Ford will provide the results of the reviews to the Committee.

Interest on any reimbursed mispayment will accrue from the date of the mispayment to the date of the reimbursement. Interest will be determined using the applicable published ''Official British Banker's Association Six Month London

(xii) any circumstance that leads the Committee to reasonably conclude that the termination of the Independent Fiduciary and replacement by a successor Independent Fiduciary is in the financial interest of the VEBA Trust, provided that the Committee documents the reasons for the termination.

Interbank Offered Rate (LIBOR) 11:00 a.m. GMT 'fixing' as reported on Bloomberg page 'BBAM' '' (the published six month LIBOR rate).[28]

Any dispute as to the amount, timing, or other feature of the mispayment and/or reimbursement shall be settled in accordance with the dispute resolution procedure found in Section 26B of the 2009 Settlement Agreement (the Dispute Resolution Procedure), which reads in pertinent part:

(i) The aggrieved party shall provide the party alleged to have violated this Settlement Agreement (Dispute Party) with written notice of such dispute, which shall include a description of the alleged violation and identification of the Section(s) of the Settlement Agreement allegedly violated. Such notice shall be provided so that it is received by the Dispute Party no later than 180 calendar days from the date of the alleged violation or the date on which the aggrieved party knew or should have known of the facts that give rise to the alleged violation, whichever is later, but in no event longer than 3 years from the date of the alleged violation; and (ii) If the Dispute Party fails to respond within 21 calendar days from its receipt of the notice, the aggrieved party may seek recourse to the District Court; provided however, that the aggrieved party waives all claims related to a particular dispute against the Dispute Party if the aggrieved party fails to bring the dispute before the District Court within 180 calendar days from the date of sending the notice. All the time periods in Section 26 of the 2009 Settlement Agreement may be extended by agreement of the parties to the particular dispute.

18. Conditions Related to TAA True-Ups and Expense Accruals

Due to the nature of the expenses charged by the entity in connection with the management of the assets in the TAA, the parties may not have accurate measures of the TAA's expenses at the time of transfer of the TAA to the VEBA Trust. As a result, the conditions for expense accruals and true-ups require the following procedure for audit and reconciling payments.

Ford and the Committee will cooperate in the calculation and review of the amounts of expense accruals related to the TAA, and the amount of any overaccrual shall be made subject to the review of an independent auditor selected by Ford and the amount of any underaccrual shall be made subject to the review of the VEBA Trust's independent auditor.

A claim by Ford for an underaccrual must be made to the Committee within the Verification Time Period, which is defined as follows in Section VII(y) of the proposed exemption:

The term ''Verification Time Period'' means: (1) With respect to each of the Securities other than the payments in respect of the New Notes, the period beginning on the date of publication of the final exemption in the Federal Register (or, if later, the date of the transfer of any such Security to the VEBA Trust) and ending 90 calendar days thereafter; (2) with respect to each payment pursuant to the New Notes, the period beginning on the date of the payment and ending 90 calendar days thereafter; and (3) with respect to the TAA, the period beginning on the date of publication of the final exemption in the Federal Register (or, if later, the date of the transfer of the assets in the TAA to the VEBA Trust) and ending 180 calendar days thereafter.

Accordingly, any claim regarding an underaccrual of expenses attributable to the TAA must be made within the period beginning on the date of publication of the final exemption in the **Federal Register** (or, if later, the date of the transfer of the assets in the TAA to the VEBA Trust) and ending 180 calendar days thereafter.

Interest on any true-up payment will accrue from the date of transfer of the assets in the TAA (or the LLC containing the assets in the TAA), until the date of payment of such true-up amount. Interest will be determined using the published six month LIBOR rate described above.

Any dispute as to the amount, timing or other feature of the true-up payment will be settled through the Dispute Resolution Procedure described above.

19. Conditions Related to Mistaken Payments

In the case of a mistaken deposit to the Ford VEBA Plan, Ford shall make a claim to the Committee regarding the particular deposit or transfer made in error or made in an amount greater than that to which the Ford VEBA Plan was entitled. The claim must be made within the Verification Time Period, which is described above.

Accordingly, any claim regarding a mistake with respect to transfer of the LLC Interests, the New Notes, or the Warrants must be made within the period beginning on the date of publication of the final exemption in the Federal Register (or, if later, the date of the transfer of any such Security to the VEBA Trust) and ending 90 calendar days thereafter. Any claim respecting a payment made under the New Notes must be made within the period beginning on the date of the payment and ending 90 calendar days thereafter. Additionally, a claim with respect to the TAA must be made within the period beginning on the date of publication of the final exemption in the Federal Register (or, if later, the date of the transfer of the assets in the TAA to the VEBA Trust) and ending 180 calendar days thereafter.

Interest on any mistaken deposit will accrue from the date of the mistaken deposit or transfer to the date of the repayment. Interest will be determined using the published six month LIBOR rate, described above. In the event of a dispute regarding the amount, timing or other feature of the mistaken deposit, the Dispute Resolution Procedure described above shall apply.

20. Statutory Findings

The Applicant makes the following statements regarding the Department's required findings under section 408(a) of ERISA that the exemption is administratively feasible, in the interests of the Ford VEBA Plan and of its participants and beneficiaries, and protective of the rights of participants and beneficiaries of the Ford VEBA Plan.

The exemption transactions are administratively feasible because they are relatively simple and straightforward, easy to monitor, and involve the management of the Securities by the Independent Fiduciary.

The exemption transactions are in the interest of the Ford VEBA Plan and of its participants and beneficiaries and protective of their rights because they constitute the only feasible mechanism to ensure that assets are dedicated to, and held in the Ford VEBA Plan solely for use as retiree health care benefits (and reasonable related expenses). In the absence of administrative relief, it is doubtful that Ford could provide alternate assets of equivalent economic value. Furthermore, the final terms of the 2009 Settlement Agreement, including the Securityholder and Registration Rights Agreement, and the terms of the New Notes, were thoroughly negotiated by a cadre of advisers representing the UAW and Class Counsel, each of whom has endorsed the subject transactions and fully supports the attendant proposal. As the Applicant contends, the process approving the settlement was rigorous and adversarial, and it ensures that the Class and the Covered Group receive the best possible terms under the circumstances.

As is contended by the Committee, the rights of participants and beneficiaries of the Ford VEBA Plan are

[28] LIBOR is calculated by Thomson Reuters and published by the British Bankers' Association after 11:00 a.m. (and generally around 11:45 a.m.) each day (London time). It is a trimmed average of inter-bank deposit rates offered by designated contributor banks, for maturities ranging from overnight to one year. The rates are a benchmark rather than a tradable rate, the actual rate at which banks will lend to one another continues to vary throughout the day.

protected by an independent committee, and their rights with respect to any Ford employer security are protected by the Independent Fiduciary, both of which will be subject to ERISA's general fiduciary obligations under section 404. The Independent Fiduciary will have the ability to dispose of the New Notes as it determines it to be in the best interests, and protective of the rights, of the Ford VEBA Plan and its participants and beneficiaries, so long as such sales are consistent with (1) the reasonable, agreed-to transfer restrictions imposed on those Securities; and (2) the registration rights provisions of those Securities.

Notice to Interested Persons

Notice of the proposed exemption will be provided to all interested persons in the manner agreed upon by the Applicant and the Department within 10 days of the date of publication of the notice of pendency in the Federal Register. Such notice will contain a copy of the notice of proposed exemption, as published in the **Federal Register**, and a ''supplemental statement,'' as required pursuant to 29 CFR 2570.43(b)(2). The supplemental statement will inform interested persons of their right to comment on and/or to request a hearing (where appropriate), with respect to the pending exemption. Written comments and hearing requests are due within 40 days of the publication of the proposed exemption in the **Federal Register**.

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of ERISA does not relieve a fiduciary or other party in interest from certain other provisions of ERISA, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of ERISA, which, among other things, require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(b) of ERISA;

(2) Before an exemption may be granted under section 408(a) of ERISA, the Department must find that the exemption is administratively feasible, in the interests of the plan and of its participants and beneficiaries, and protective of the rights of participants and beneficiaries of the plan;

(3) The proposed exemption, if granted, will be supplemental to, and not in derogation of, any other provisions of ERISA, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(4) The proposed exemption, if granted, will be subject to the express condition that the material facts and representations contained in the application are true and complete, and that the application accurately describes all material terms of the transaction which is the subject of the exemption.

Proposed Exemption

Based on the facts and representations set forth in the application, the Department is considering granting the requested exemption under the authority of section 408(a) of the Act and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990), as follows:

Section I. Covered Transactions

(a) If the exemption is granted, the restrictions of sections 406(a)(1)(A), 406(a)(1)(B), 406(a)(1)(E), 406(a)(2), 406(b)(1), 406(b)(2) and 407(a) of ERISA shall not apply, effective December 31, 2009, to:

(1) The acquisition by the UAW Ford Retirees Medical Benefits Plan (the Ford VEBA Plan) and its funding vehicle, the UAW Retiree Medical Benefits Trust (the VEBA Trust) of: (i) The LLC Interests; (ii) New Note A; (iii) New Note B (together with New Note A, the New Notes); and (iv) Warrants to acquire 362,391,305 shares of Ford Common Stock at a strike price of $9.20 per share, expiring on January 1, 2013, transferred by Ford and deposited in the Ford Employer Security Sub-Account of the Ford Separate Retiree Account of the VEBA Trust.

(2) The acquisition by the Ford VEBA Plan of shares of Ford Common Stock pursuant to Ford's right to settle its payment obligations under New Note B in shares of Ford Common Stock (*i.e.*, Payment Shares), consistent with the 2009 Settlement Agreement;

(3) The acquisition by the Ford VEBA Plan of shares of Ford Common Stock, pursuant to the Independent Fiduciary's exercise of all or a pro rata portion of the Warrants, consistent with the 2009 Settlement Agreement;

(4) The holding by the Ford VEBA Plan of the aforementioned Securities in the Ford Employer Security Sub-Account of the Ford Separate Retiree Account of the VEBA Trust, consistent with the 2009 Settlement Agreement;

(5) The deferred payment of any amounts due under New Note B by Ford pursuant to the terms thereunder; and

(6) The disposition of the Securities by the Independent Fiduciary.

(b) If the exemption is granted, the restrictions of sections 406(a)(1)(A), 406(b)(1), and 406(b)(2) of ERISA shall not apply, effective December 31, 2009, to the sale of Ford Common Stock held by the Ford VEBA Plan to Ford in accordance with the Right of First Offer or a Ford self-tender under the Securityholder and Registration Rights Agreement.

(c) If the exemption is granted, the restrictions of sections 406(a)(1)(B), 406(a)(1)(D), 406(b)(1), and 406(b)(2) of ERISA shall not apply, effective December 31, 2009, to:

(1) The extension of credit or transfer of assets by Ford, the Ford Retiree Health Plan, or the Ford VEBA Plan in payment of a benefit claim that was the responsibility and legal obligation, under the terms of the applicable plan documents, of one of the other parties listed in this paragraph;

(2) The reimbursement by Ford, the Ford Retiree Health Plan, or the Ford VEBA Plan, of a benefit claim that was paid by another party listed in this paragraph, which was not legally responsible for the payment of such claim, plus interest;

(3) The retention of an amount by Ford until payment to the Ford VEBA Plan resulting from an overaccrual of pre-transfer expenses attributable to the TAA or the retention of an amount by the Ford VEBA Plan until payment to Ford resulting from an underaccrual of pre-transfer expense attributable to the TAA; and

(4) The Ford VEBA Plan's payment to Ford of an amount equal to any underaccrual by Ford of pre-transfer expenses attributable to the TAA or the payment by Ford to the Ford VEBA Plan of an amount equal to any overaccrual by Ford of pre-transfer expenses attributable to the TAA.

(d) If the exemption is granted, the restrictions of sections 406(a)(1)(B), 406(a)(1)(D), 406(b)(1), and 406(b)(2) of ERISA shall not apply, effective December 31, 2009, to the return to Ford of assets deposited or transferred to the Ford VEBA Plan by mistake, plus interest.

Section II. Conditions Applicable to Section I(a) and I(b)

(a) The Committee appoints a qualified Independent Fiduciary to act on behalf of the Ford VEBA Plan for all purposes related to the transfer of the

Securities to the Ford VEBA Plan for the duration of the Ford VEBA Plan's holding of the Securities. Such Independent Fiduciary will have sole discretionary responsibility relating to the holding, ongoing management and disposition of the Securities, except for the voting of the Ford Common Stock. The Independent Fiduciary has determined or will determine, before taking any actions regarding the Securities, that each such action or transaction is in the interest of the Ford VEBA Plan.

(b) In the event that the same Independent Fiduciary is appointed to represent the interests of one or more of the other plans comprising the VEBA Trust (*i.e.*, the UAW Chrysler Retiree Medical Benefits Plan and/or the UAW General Motors Company Retiree Medical Benefits Plan) with respect to employer securities deposited into the VEBA Trust, the Committee takes the following steps to identify, monitor and address any conflict of interest that may arise with respect to the Independent Fiduciary's performance of its responsibilities:

(1) The Committee appoints a ''conflicts monitor'' to: (i) Develop a process for identifying potential conflicts; (ii) regularly review the Independent Fiduciary reports, investment banker reports, and public information regarding the companies, to identify the presence of factors that could lead to a conflict; and (iii) further question the Independent Fiduciary when appropriate.

(2) The Committee adopts procedures to facilitate prompt replacement of the Independent Fiduciary if the Committee in its sole discretion determines such replacement is necessary due to a conflict of interest.

(3) The Committee requires the Independent Fiduciary to adopt a written policy regarding conflicts of interest. Such policy shall require that, as part of the Independent Fiduciary's periodic reporting to the Committee, the Independent Fiduciary includes a discussion of actual or potential conflicts identified by the Independent Fiduciary and options for avoiding or resolving the conflicts.

(c) The Independent Fiduciary authorizes the trustee of the Ford VEBA Plan to dispose of the Ford Common Stock (including any Payment Shares or any shares of Ford Common Stock acquired pursuant to exercise of the Warrants), the LLC Interests, the New Notes, or exercise the Warrants, only after the Independent Fiduciary determines, at the time of the transaction, that the transaction is feasible, in the interest of the Ford VEBA Plan, and protective of the participants and beneficiaries of the Ford VEBA Plan.

(d) The Independent Fiduciary negotiates and approves on behalf of the Ford VEBA Plan any transactions between the Ford VEBA Plan and any party in interest involving the Securities that may be necessary in connection with the subject transactions (including but not limited to the registration of the Securities contributed to the Ford VEBA Plan).

(e) Any contract between the Independent Fiduciary and an investment banker includes an acknowledgement by the investment banker that the investment banker's ultimate client is an ERISA plan.

(f) The Independent Fiduciary discharges its duties consistent with the terms of the Ford VEBA Plan, the Trust Agreement, the Independent Fiduciary Agreement, and any other documents governing the Securities, such as the Registration Rights Agreement.

(g) The Ford VEBA Plan incurs no fees, costs or other charges (other than described in the Trust Agreement, the 2009 Settlement Agreement, and the Securityholder and Registration Rights Agreement) as a result of the transactions exempted herein.

(h) The terms of any transaction exempted herein are no less favorable to the Ford VEBA Plan than the terms negotiated at arms' length under similar circumstances between unrelated parties.

Section III. Conditions Applicable to Section I(c)(1) and I(c)(2)

(a) The Committee and the Ford VEBA Plan's third party administrator will review the benefits paid during the transition period and determine the dollar amount of mispayments made, subject to the review of the Ford VEBA Plan's independent auditor. The results of this review will be made available to Ford.

(b) Ford and the applicable third party administrator of the Ford Active Health Plan will review the benefits paid during the transition period and determine the dollar amount of mispayments made, subject to the review of the plan's independent auditor. The results of this review will be made available to the Committee.

(c) Interest on any reimbursed mispayment will accrue from the date of the mispayment to the date of the reimbursement.

(d) Interest will be determined using the applicable 6 month published LIBOR rate.

(e) If there is a dispute as to the amount, timing or other feature of a reimbursement payment, the parties will enter into the Dispute Resolution Procedure found in Section 26B of the 2009 Settlement Agreement and described further in Section VII(c) herein.

Section IV. Conditions Applicable to Section I(c)(3) and I(c)(4)

(a) Ford and the Committee will cooperate in the calculation and review of the amounts of expense accruals related to the TAA, and the amount of any overaccrual shall be made subject to the review of an independent auditor selected by Ford and the amount of any underaccrual shall be made subject to the review of the Ford VEBA Plan's independent auditor.

(b) Ford must make a claim for any underaccrual to the Committee, and the Committee must make a claim for any overaccrual to Ford, as applicable, within the Verification Time Period, as defined in Section VII(y).

(c) Interest on any true-up payment will accrue from the date of transfer of the assets in the TAA (or the LLC containing the TAA) for the amount in respect of the overaccrual or underaccrual, as applicable, until the date of payment of such true-up amount.

(d) Interest will be determined using the published six month LIBOR rate.

(e) If there is a dispute as to the amount, timing or other feature of a true-up payment in respect of TAA expenses, the parties will enter into the Dispute Resolution Procedure found in Section 26B of the 2009 Settlement Agreement and described further in Section VII(c) herein.

Section V. Conditions Applicable to Section I(d)

(a) Ford must make a claim to the Committee regarding the specific deposit or transfer made in error or made in an amount greater than that to which the Ford VEBA Plan was entitled.

(b) The claim is made within the Verification Time Period, as defined in Section VII(y).

(c) Interest on any mistaken deposit or transfer will accrue from the date of the mistaken deposit or transfer to the date of the repayment.

(d) Interest will be determined using the published six month LIBOR rate.

(e) If there is a dispute as to the amount, timing or other feature of a mistaken payment, the parties will enter into the Dispute Resolution Procedure found in Section 26B of the 2009 Settlement Agreement and described further in Section VII(c) herein.

Section VI. Conditions Applicable to Section I

(a) The Committee and the Independent Fiduciary maintain for a period of six years from the date (i) the Securities are transferred to the Ford VEBA Plan, and (ii) the shares of Ford Common Stock are acquired by the Ford VEBA Plan through the exercise of the Warrants or Ford's delivery of Payment Shares in settlement of its payment obligations under New Note B, the records necessary to enable the persons described in paragraph (b) below to determine whether the conditions of this exemption have been met, provided that (i) a separate prohibited transaction will not be considered to have occurred if, due to circumstances beyond the control of the Committee and/or the Independent Fiduciary, the records are lost or destroyed prior to the end of the six-year period, and (ii) no party in interest other than the Committee or the Independent Fiduciary shall be subject to the civil penalty that may be assessed under ERISA section 502(i) if the records are not maintained, or are not available for examination as required by paragraph (b) below; and

(b) Notwithstanding any provisions of subsections (a)(2) and (b) of section 504 of ERISA, the records referred to in paragraph (a) above shall be unconditionally available at their customary location during normal business hours to:

(A) Any duly authorized employee or representative of the Department or the Internal Revenue Service;

(B) the UAW or any duly authorized representative of the UAW;

(C) Ford or any duly authorized representative of Ford;

(D) the Independent Fiduciary or any duly authorized representative of the Independent Fiduciary;

(E) the Committee or any duly authorized representative of the Committee; and

(F) any participant or beneficiary of the Ford VEBA Plan or any duly authorized representative of such participant or beneficiary.

Section VII. Definitions

(a) The term ''affiliate'' means: (1) Any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with such other person; (2) any officer, director, partner, or employee in any such person, or relative (as defined in section 3(15) of ERISA) of any such person; or (3) any corporation, partnership or other entity of which such person is an officer, director or partner. (For purposes of this definition, the term ''control'' means the power to exercise a controlling influence over the management or policies of a person other than an individual).

(b) The ''Committee'' means the eleven individuals consisting of six independent members and five UAW appointed members who will serve as the plan administrator and named fiduciary of the Ford VEBA Plan.

(c) The term ''Dispute Resolution Procedure'' means the process found in Section 26B of the 2009 Settlement Agreement to effectuate the resolution of any dispute respecting the transactions described in Sections I(c)(1), (c)(2), (c)(3), (c)(4), and (d) herein, and which reads in pertinent part: (1) The aggrieved party shall provide the party alleged to have violated the 2009 Settlement Agreement (Dispute Party) with written notice of such dispute, which shall include a description of the alleged violation and identification of the Section(s) of the 2009 Settlement Agreement allegedly violated. Such notice shall be provided so that it is received by the Dispute Party no later than 180 calendar days from the date of the alleged violation or the date on which the aggrieved party knew or should have known of the facts that give rise to the alleged violation, whichever is later, but in no event longer than 3 years from the date of the alleged violation; and (2) If the Dispute Party fails to respond within 21 calendar days from its receipt of the notice, the aggrieved party may seek recourse to the District Court; provided however, that the aggrieved party waives all claims related to a particular dispute against the Dispute Party if the aggrieved party fails to bring the dispute before the District Court within 180 calendar days from the date of sending the notice. All the time periods in Section 26 of the 2009 Settlement Agreement may be extended by agreement of the parties to the particular dispute.

(d) The term ''Exchange Agreement'' means the Security Exchange Agreement among Ford, the subsidiary guarantors listed in Schedule I thereto and the LLC, effective as of November 9, 2009.

(e) The term ''Ford'' or the ''Applicant'' means Ford Motor Company, located in Detroit MI, and its affiliates.

(f) The term ''Ford Active Health Plan'' means the medical benefits plan maintained by Ford to provide benefits to eligible active hourly employees of Ford and its participating subsidiaries.

(g) The term ''Ford Common Stock'' means the shares of common stock, par value $0.01 per share, issued by Ford.

(h) The term ''Ford Employer Security Sub-Account of the Ford Separate Retiree Account of the VEBA Trust'' means the sub-account established in the Ford Separate Retiree Account of the VEBA Trust to hold Securities on behalf of the Ford VEBA Plan.

(i) The term ''Ford Retiree Health Plan'' means the retiree medical benefits plan maintained by Ford that provided benefits to, among others, those who will be covered by the Ford VEBA Plan.

(j) The term ''Implementation Date'' means December 31, 2009.

(k) The term ''Independent Fiduciary'' means a fiduciary that is (1) independent of and unrelated to Ford, the UAW, the Committee, and their affiliates, and (2) appointed to act on behalf of the Ford VEBA Plan with respect to the holding, management and disposition of the Securities. In this regard, the fiduciary will be deemed not to be independent of and unrelated to Ford, the UAW, the Committee, and their affiliates if (1) such fiduciary directly or indirectly controls, is controlled by, or is under common control with Ford, the UAW, the Committee or their affiliates, (2) such fiduciary directly or indirectly receives any compensation or other consideration from Ford, the UAW or any Committee member in his or her individual capacity in connection with any transaction contemplated in this exemption (except that an Independent Fiduciary may receive compensation from the Committee or the Ford VEBA Plan for services provided to the Ford VEBA Plan in connection with the transactions discussed herein if the amount or payment of such compensation is not contingent upon or in any way affected by the independent fiduciary's ultimate decision), and (3) the annual gross revenue received by the fiduciary, in any fiscal year, from Ford, the UAW or a member of the Committee in his or her individual capacity, exceeds 3% of the fiduciary's annual gross revenue from all sources (for federal income tax purposes) for its prior tax year.[29]

(l) The term ''LLC'' means the Ford-UAW Holdings LLC, established by Ford as a wholly-owned LLC to hold the assets in the TAA and certain other assets required to be contributed to the VEBA under the 2008 Settlement

[29] The Department notes that the preceding conditions are not exclusive, and that other circumstances may develop which cause the Independent Fiduciary to be deemed not to be independent of and unrelated to Ford, the UAW, the Committee, and their affiliates.

Agreement, namely (1) a convertible note due January 1, 2013 with an aggregate principal amount of $3.3 billion bearing 5.75% interest per annum payable semi-annually (the Convertible Note), and (2) a term note due January 1, 2018 with a principal amount of $3.0 billion bearing 9.50% interest per annum payable semi-annually (the Term Note).

(m) The term ''LLC Interests'' means Ford's wholly-owned interest in the LLC.

(n) The term ''New Note A'' means the amortizing guaranteed secured note maturing on June 30, 2022, in the principal amount of $6,705,470,000, with payments to be made in cash, in annual installments from 2009 through 2022, issued by Ford and referred to in the Exchange Agreement.

(o) The term ''New Note B'' means the amortizing guaranteed secured note maturing June 30, 2022, in the principal amount of $6,511,850,000, with payments to be made in cash, Ford Common Stock, or a combination thereof, in annual installments from 2009 through 2022, issued by Ford and referred to in the Exchange Agreement.

(p) The term ''published six month LIBOR rate'' means the Official British Banker's Association Six Month London Interbank Offered Rate (LIBOR) 11:00am GMT ''fixing'' as reported on Bloomberg page ''BBAM''.[30]

(q) The term ''Securities'' means (1) New Note A; (2) New Note B; (3) the Warrants; (4) the LLC Interests, (5) any Payment Shares, and (6) additional shares of Ford Common Stock acquired pursuant to the Independent Fiduciary's exercise of the Warrants.

(r) The term ''Securityholder and Registration Rights Agreement'' means the Securityholder and Registration Rights Agreement by and among Ford and Ford-UAW Holdings LLC, effective as of November 9, 2009.

(s) The term ''2008 Settlement Agreement'' means the settlement agreement, effective as of August 29, 2008, entered into by Ford, the UAW, and a class of retirees in the case of *Int'l Union, UAW, et al.* v. *Ford Motor Company,* Civil Action No. 07–14845, 2008 WL 4104329 (E.D. Mich. Aug. 29, 2008).

(t) The term ''2009 Settlement Agreement'' means the 2008 Settlement Agreement, as amended by an Amendment to such Settlement Agreement dated July 23, 2009, effective as of November 9, 2009, entered into by Ford, the UAW, and a class of retirees in the case of *Int'l Union, UAW, et al.* v. *Ford Motor Company,* Civil Action No. 07–14845, 2008 WL 4104329 (E.D. Mich. Aug. 29, 2008), *Order and Final Judgment Granted,* Civil Action No. 07–14845, Doc. #71, (E.D. Mich. Nov. 9, 2009).

(u) The term ''TAA'' means the temporary asset account established by Ford under the 2008 Settlement Agreement to serve as tangible evidence of the availability of Ford assets equal to Ford's obligation to the Ford VEBA Plan.

(v) The term ''Trust Agreement'' means the trust agreement for the VEBA Trust.

(w) The term ''UAW'' means the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America.

(x) The term ''VEBA'' means the Ford UAW Retirees Medical Benefits Plan (the Ford VEBA Plan) and its associated UAW Retiree Medical Benefits Trust (the VEBA Trust).

(y) The term ''Verification Time Period'' means: (1) With respect to each of the Securities other than the payments in respect of the New Notes, the period beginning on the date of publication of the final exemption in the **Federal Register** (or, if later, the date of the transfer of any such Security to the Ford VEBA Plan) and ending 90 calendar days thereafter; (2) with respect to each payment pursuant to the New Notes, the period beginning on the date of the payment and ending 90 calendar days thereafter; and (3) with respect to the TAA, the period beginning on the date of publication of the final exemption in the **Federal Register** (or, if later, the date of the transfer of the assets in the TAA to the Ford VEBA Plan) and ending 180 calendar days thereafter.

(z) The term ''Warrants'' means warrants to acquire shares of Ford Common Stock, par value $0.01 per share, issued by Ford.

Signed at Washington, DC, this 3rd day of December 2009.

Ivan Strasfeld,

Director of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor.

[FR Doc. E9–29223 Filed 12–7–09; 8:45 am]

BILLING CODE 4510–29–P

[30] LIBOR is calculated by Thomson Reuters and published by the British Bankers' Association after 11 a.m. (and generally around 11:45 a.m.) each day (London time). It is a trimmed average of inter-bank deposit rates offered by designated contributor banks, for maturities ranging from overnight to one year. The rates are a benchmark rather than a tradable rate, the actual rate at which banks will lend to one another continues to vary throughout the day.

DEPARTMENT OF LABOR

Employment and Training Administration

Investigations Regarding Certifications of Eligibility To Apply for Worker Adjustment Assistance

Petitions have been filed with the Secretary of Labor under Section 221(a) of the Trade Act of 1974 (''the Act'') and are identified in the Appendix to this notice. Upon receipt of these petitions, the Director of the Division of Trade Adjustment Assistance, Employment and Training Administration, has instituted investigations pursuant to Section 221(a) of the Act.

The purpose of each of the investigations is to determine whether the workers are eligible to apply for adjustment assistance under Title II, Chapter 2, of the Act. The investigations will further relate, as appropriate, to the determination of the date on which total or partial separations began or threatened to begin and the subdivision of the firm involved.

The petitioners or any other persons showing a substantial interest in the subject matter of the investigations may request a public hearing, provided such request is filed in writing with the Director, Division of Trade Adjustment Assistance, at the address shown below, not later than December 18, 2009.

Interested persons are invited to submit written comments regarding the subject matter of the investigations to the Director, Division of Trade Adjustment Assistance, at the address shown below, not later than December 18, 2009.

The petitions filed in this case are available for inspection at the Division of Trade Adjustment Assistance, Employment and Training Administration, U.S. Department of Labor, Room N–5428, 200 Constitution Avenue, NW., Washington, DC 20210.

Signed at Washington, DC, this 18th day of November 2009.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

APPENDIX

[TAA petitions instituted between 11/2/09 and 11/6/09]

TA–W	Subject firm (Petitioners)	Location	Date of institution	Date of petition
72724	Freedom Communications (Wkrs)	Jacksonville, NC	11/03/09	10/28/09
72725	Freescale Semiconductor, Inc. (Wkrs)	Austin, TX	11/02/09	09/28/09
72726	U.S Textile Corporation (Comp)	Newland, NC	11/02/09	10/21/09
72727	Andrews International (Comp)	Benton Harbor, MI	11/02/09	10/29/09
72728	Keiper, LLC (Wkrs)	Troy, MI	11/02/09	10/26/09
72729	International Paper, Pineville Mill (State)	Pineville, LA	11/02/09	10/23/09
72730	Gateway Corporation (Comp)	Corinth, MS	11/02/09	10/27/09
72731	MetLife (Wkrs)	Johnstown, PA	11/02/09	10/29/09
72732	Federal-Mogul (Comp)	Michigan City, IN	11/02/09	10/30/09
72733	HMX Tailored (Wkrs)	Buffalo, NY	11/02/09	10/30/09
72734	Nukote International (Wkrs)	Rochester, NY	11/02/09	10/30/09
72735	Colfer Manufacturing, Inc. (Union)	Minerva, OH	11/02/09	10/28/09
72736	General Motors Powertrain (Union)	Buffalo, NY	11/02/09	10/28/09
72737	GE Transportation (Union)	Emporium, PA	11/03/09	11/02/09
72738	Knowledge Networks (Comp)	Cranford, NJ	11/03/09	10/30/09
72739	U.S. Steel Tublar Products, Inc. (Union)	Hughes Springs, TX	11/03/09	11/02/09
72740	Bruss North America (Comp)	Russell Springs, KY	11/03/09	10/31/09
72741	Landmark Automotive, LLC (Wkrs)	Lawrenceburg, TN	11/03/09	10/28/09
72742	Cooper Standard Automotive (Wkrs)	Bowling Green, OH	11/03/09	11/02/09
72743	Ormet Primary Aluminum Corporation (Comp)	Hannibal, OH	11/03/09	10/27/09
72744	The H. B. Smith Company, Inc. (Comp)	Westfield, MA	11/03/09	10/27/09
72745	Sanborn Map Company (Wkrs)	Chesterfield, MO	11/03/09	10/26/09
72746	Merkle-Korff Industries (Comp)	Darlington, WI	11/03/09	10/21/09
72747	Patterson UTI (Wkrs)	San Angelo, TX	11/03/09	10/30/09
72748	New United Motor Manufacturing (State)	Fremont, CA	11/03/09	10/29/09
72749	Norforge and Machining, Inc. (Comp)	Bushnell, IL	11/03/09	10/30/09
72750	Schneider National (Wkrs)	Seville, OH	11/03/09	10/29/09
72751	New Mather Metals, Inc. (Comp)	Toledo, OH	11/03/09	10/20/09
72752	Arcelor Mittal Steel (Wkrs)	Steelton, PA	11/03/09	11/02/09
72753	Galax Energy Concepts (Wkrs)	Galax, VA	11/03/09	10/27/09
72754	Speck Buildings, LLC (Comp)	Meridian, ID	11/03/09	10/26/09
72755	DW Enterprise of Ashland, Inc. (Comp)	Ashland, OH	11/04/09	11/02/09
72756	Hendrickson USA, LLC (Comp)	Canton, OH	11/04/09	11/02/09
72757	Intermet New River Foundry (Wkrs)	Radford, VA	11/04/09	10/28/09
72758	Wacker Polymers (Comp)	Allentown, PA	11/04/09	11/02/09
72759	Donsco, Inc. (Wkrs)	Wrightsville, PA	11/04/09	11/03/09
72760	Georgia Pacific (State)	Fordyce, AR	11/04/09	11/03/09
72761	Waterfowl Packaging, LLC (Comp)	Fort Payne, AL	11/04/09	10/28/09
72762	Upper Connecticut Valley Hospital (Comp)	Colebrook, NH	11/04/09	11/02/09
72763	Thermo Fisher Scientific—Matrix Technologies (Compe)	Hudson, NH	11/04/09	10/09/09
72764	International Paper Company (Comp)	Franklin, VA	11/04/09	11/03/09
72765	Agora Management (State)	Baltimore, MD	11/04/09	10/03/09
72766	INFOR (Wkrs)	Chicago, IL	11/05/09	05/29/09
72767	Hologic, Inc. (Comp)	Redwood City, CA	11/05/09	10/28/09
72768	Solid State Measurements, Inc. (Wkrs)	Pittsburgh, PA	11/04/09	11/03/09
72769	Siemens IT Solutions and Services (Wkrs)	Clarks Summit, PA	11/05/09	10/30/09
72770	DEX Media, Inc. (Union)	Lone Tree, CO	11/05/09	10/23/09
72771	HMC Technologies (Comp)	New Albany, MS	11/05/09	10/28/09
72772	Narrow Fabric Industries, Corporation (Comp)	West Reading, PA	11/05/09	11/04/09
72773	Clark Engineering Company (State)	Owosso, MI	11/05/09	10/14/09
72774	CRH of North America (State)	Warren, MI	11/05/09	10/14/09
72775	Spirex Corporation (Wkrs)	Sullivan, WI	11/05/09	11/04/09
72776	Masters Tool and Die, Inc. (State)	Saginaw, MI	11/05/09	10/14/09
72777	Caterpillar Inc., Building Construction Projects Division (Comp).	Clayton, NC	11/05/09	11/03/09
72778	Kenco Logistic Services, LLC (Wkrs)	Webster City, IA	11/06/09	11/05/09
72779	Kenco Logistic Services, LLC (Wkrs)	Ames, IA	11/06/09	11/05/09
72780	Flametech DBA Xaloy (Comp)	Seabrook, NH	11/06/09	10/20/09
72781	Quebecor World (Wkrs)	Covington, TN	11/06/09	11/04/09
72782	Amweld International, LLC (Wkrs)	North Jackson, OH	11/06/09	11/01/09
72783	Siemens IT Solutions and Services, Inc. (Comp)	Clark Summit, PA	11/06/09	11/05/09
72784	RadlSys Corporation (Comp)	Boca Raton, FL	11/06/09	11/03/09
72785	Beneteau USA (Wkrs)	Marion, SC	11/06/09	11/02/09
72786	Rexnord (State)	Milwaukee, WI	11/06/09	11/05/09

[FR Doc. E9–29143 Filed 12–7–09; 8:45 am]
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DEPARTMENT OF LABOR

Employment and Training Administration

Investigations Regarding Certifications of Eligibility To Apply for Worker Adjustment Assistance

Petitions have been filed with the Secretary of Labor under Section 221(a) of the Trade Act of 1974 (''the Act'') and are identified in the Appendix to this notice. Upon receipt of these petitions, the Director of the Division of Trade Adjustment Assistance, Employment and Training Administration, has instituted investigations pursuant to Section 221(a) of the Act.

The purpose of each of the investigations is to determine whether the workers are eligible to apply for adjustment assistance under Title II, Chapter 2, of the Act. The investigations will further relate, as appropriate, to the determination of the date on which total or partial separations began or threatened to begin and the subdivision of the firm involved.

The petitioners or any other persons showing a substantial interest in the subject matter of the investigations may request a public hearing, provided such request is filed in writing with the Director, Division of Trade Adjustment Assistance, at the address shown below, not later than December 18, 2009.

Interested persons are invited to submit written comments regarding the subject matter of the investigations to the Director, Division of Trade Adjustment Assistance, at the address shown below, not later than December 18, 2009.

The petitions filed in this case are available for inspection at the Division of Trade Adjustment Assistance, Employment and Training Administration, U.S. Department of Labor, Room N–5428, 200 Constitution Avenue, NW., Washington, DC 20210.

Signed at Washington, DC, this 19th day of November 2009.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

TA–W	Subject firm (petitioners)	Location	Date of institution	Date of petition
72787	Visual Systems, Inc. (Wkrs)	Milwaukee, WI	11/09/09	11/06/09
72788	Barnes Aerospace (State)	Windsor, CT	11/09/09	11/06/09
72789	The Hartford (State)	Hartford, CT	11/09/09	11/06/09
72790	AGNI GenCell, Inc. (Wkrs)	Southbury, CT	11/09/09	11/03/09
72791	Siemens Industry, Inc. (Wkrs)	Spring House, PA	11/09/09	11/05/09
72792	Big River Box, Inc. (State)	Keokuk, IA	11/09/09	11/08/09
72793	Gates Corporation (State)	Boone, IA	11/09/09	11/08/09
72794	Unitex Chemical Corporation (Wkrs)	Greensboro, NC	11/09/09	11/09/09
72795	FreightCar America (Comp)	Johnstown, PA	11/09/09	11/06/09
72796	Bar Processing Corporation (Wkrs)	Hammond, IN	11/09/09	11/03/09
72797	RadiSys Corporation (Comp)	Boca Raton, FL	11/09/09	11/03/09
72798	Barnes Aerospace (State)	East Granby, CT	11/09/09	11/06/09
72799	Chrome Craft Corporation (Union)	Highland Park, MI	11/09/09	11/06/09
72800	Cord Crafts, LLC (Wkrs)	Wharton, NJ	11/09/09	11/06/09
72801	AGI In Store (Comp)	Forest City, NC	11/09/09	11/06/09
72802	North American Enclosures, Inc. (Comp)	Central Islip, NY	11/09/09	11/06/09
72803	Latrobe Specialty Steel (Comp)	Latrobe, PA	11/09/09	11/06/09
72804	Borland Software (a Microfocus Company) (Wkrs)	Austin, TX	11/09/09	11/05/09
72805	Thyssenkrupp Waupaca, Inc. Plant 6 (Wkrs)	Etowah, TN	11/09/09	11/05/09
72806	3M (Wkrs)	Soquel, CA	11/09/09	11/03/09
72807	ET Lowe Publishing Company (Wkrs)	Nashville, TN	11/09/09	11/05/09
72808	Comcast Cable, Inc. (Wkrs)	Beaverton, OR	11/09/09	11/05/09
72809	Kellwood (Wkrs)	New York, NY	11/10/09	11/04/09
72810	SBNA/Durez Division (Wkrs)	North Tonawanda, NY	11/10/09	11/04/09
72811	Holo-Krome Company (State)	West Hartford, CT	11/10/09	11/04/09
72812	UAW Local 900 (Wkrs)	Wayne, MI	11/10/09	11/03/09
72813	Sermatech International (Union)	Royersford, PA	11/10/09	11/09/09
72814	Ariba, Inc. (Wkrs)	Sunnyvale, CA	11/10/09	11/09/09
72815	Creekside Mushrooms Ltd. (Comp)	Worthington, PA	11/10/09	11/09/09
72816	Freudenberg (State)	Spencer, IA	11/10/09	11/09/09
72817	Powers Manufacturing Company (State)	Allison, IA	11/10/09	11/09/09
72818	Denman Tire Corporation (Union)	Leavittsburg, OH	11/10/09	11/09/09
72819	Siemens Energy and Automation, Inc. (Wkrs)	New Kensington, PA	11/10/09	11/07/09
72820	Maverick Tube, LLC (Comp)	Counce, TN	11/10/09	11/09/09
72821	Maverick Tube (Comp)	Houston, TX	11/10/09	11/09/09
72822	Maverick Tube, LLC (Comp)	Conroe, TX	11/10/09	11/09/09
72823	Salem Carriers (Wkrs)	Winston-Salem, NC	11/10/09	11/09/09
72824	Phasetronics, Inc. (Wkrs)	Clearwater, FL	11/10/09	11/09/09
72825	Guardian Automotive Products, Inc. (Comp)	Upper Sandusky, OH	11/10/09	11/09/09
72826	Alleson of Rochester, Inc. (Union)	Rochester, NY	11/10/09	11/09/09
72827	Detroit Heading (Union)	Madison Heights, MI	11/10/09	11/09/09
72828	Krieger-Ragsdale (Wkrs)	Evansville, IN	11/10/09	11/09/09
72829	Circuit Services World Wide (Wkrs)	Bellevue, WA	11/10/09	11/09/09
72830	ECM Transport (Wkrs)	New Kensington, PA	11/12/09	11/11/09
72831	Elite Enclosure Company, LLC. (Comp)	Fort Loramie, OH	11/12/09	11/09/09
72832	Verizon Communications, Inc. (Wkrs)	Falls Church, VA	11/12/09	10/31/09
72833	GEO Speciality Chemicals (Comp)	Deer Park, TX	11/12/09	11/10/09
72834	Cover Craft Industries (Wkrs)	Fremont, OH	11/13/09	11/09/09
72835	Maxx US Corporation (Union)	Southampton, PA	11/13/09	11/03/09
72836	Iron Mountain (State)	North Billerica, MA	11/13/09	11/12/09

TA–W	Subject firm (petitioners)	Location	Date of institution	Date of petition
72837	Heartland Drilling (Wkrs)	San Angelo, TX	11/13/09	11/12/09
72838	Will and Baumer Candle Company, LLC (Comp)	Liverpool, NY	11/13/09	11/06/09
72839	United States Bronze, Inc. (Union)	Flemington, NJ	11/13/09	11/06/09
72840	GE Oil and Gas (Comp)	Bethlehem, PA	11/13/09	11/02/09
72841	GE Oil and Gas (Comp)	Easton, PA	11/13/09	11/02/09
72842	Nabors Drilling (Wkrs)	Houston, TX	11/13/09	11/12/09
72843	HSBC (Wkrs)	London, KY	11/13/09	11/12/09
72844	Paramount Precision Products, Inc. (Comp)	Oak Park, MI	11/13/09	11/06/09

[FR Doc. E9–29144 Filed 12–7–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–70,387]

Conrad Imports, Inc., San Francisco, CA; Notice of Negative Determination Regarding Application for Reconsideration

By application dated October 1, 2009, a petitioner requested administrative reconsideration of the Department's negative determination regarding eligibility to apply for Trade Adjustment Assistance (TAA), applicable to workers and former workers of the subject firm. The denial notice was signed on September 4, 2009 and published in the **Federal Register** on November 5, 2009 (74 FR 57342).

Pursuant to 29 CFR 90.18(c) reconsideration may be granted under the following circumstances:

(1) If it appears on the basis of facts not previously considered that the determination complained of was erroneous;

(2) if it appears that the determination complained of was based on a mistake in the determination of facts not previously considered; or

(3) if in the opinion of the Certifying Officer, a misinterpretation of facts or of the law justified reconsideration of the decision.

The initial investigation resulted in a negative determination which was based on the finding that imports of finishing and quality control services did not contribute importantly to worker separations at the subject firm and there was no shift to a foreign country in services supplied by the workers of the subject firm.

In the request for reconsideration the petitioner alleged that workers of Conrad Imports, Inc. tailored the shades to the customer's specifications and performed other finishing services. The petitioner further alleged that Conrad Imports, Inc. opened a facility in Korea in 2007 and that finishing work has been shifted from the subject facility to Korea.

The Department contacted Conrad Imports, Inc. official to address the above allegations. The company official confirmed that Conrad Imports, Inc. has a subsidiary in Korea, which supplies window coverings to the subject firm. However, the company official also stated that quality control and finishing services were not shifted from California facility to Korea. The official confirmed what was revealed in the initial investigation. The investigation revealed that the reduction in business volume caused the subject firm's reorganization and that the layoffs at the subject facility was not related to imports of finishing quality control services and there was no shift in these services abroad.

The petitioner did not supply facts not previously considered; nor provide additional documentation indicating that there was either (1) a mistake in the determination of facts not previously considered or (2) a misinterpretation of facts or of the law justifying reconsideration of the initial determination.

After careful review of the request for reconsideration, the Department determines that 29 CFR 90.18(c) has not been met.

Conclusion

After review of the application and investigative findings, I conclude that there has been no error or misinterpretation of the law or of the facts which would justify reconsideration of the Department of Labor's prior decision. Accordingly, the application is denied.

Signed in Washington, DC, this 10th day of November 2009.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–29149 Filed 12–7–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–70,344]

Atlantic Southeast Airlines, a Subsidiary of Skywest, Inc., Airport Customer Service Division, Including On-Site Leased Workers of Delta Global Services, Inc., Fort Smith, AR; Notice of Negative Determination Regarding Application for Reconsideration

By application dated October 19, 2009, a petitioner requested administrative reconsideration of the Department's negative determination regarding eligibility to apply for Trade Adjustment Assistance (TAA), applicable to workers and former workers of the subject firm. The denial notice was signed on September 28, 2009 and will soon be published in the **Federal Register**.

Pursuant to 29 CFR 90.18(c) reconsideration may be granted under the following circumstances:

(1) If it appears on the basis of facts not previously considered that the determination complained of was erroneous;

(2) If it appears that the determination complained of was based on a mistake in the determination of facts not previously considered; or

(3) If in the opinion of the Certifying Officer, a misinterpretation of facts or of the law justified reconsideration of the decision.

The initial investigation resulted in a negative determination, based on the finding that imports of services like or directly competitive with the services performed by the workers of the subject firm did not contribute to worker separations at the subject facility and there was no shift or acquisition of the services from a foreign country during the period under investigation.

The petitioner alleged that the subject firm is located in a manufacturing center and provided a list of local companies and manufacturing plants representing various industries. The

petitioner stated that these companies had been shifting their production abroad and downsizing their business. As a result the manufacturing companies have been certified eligible for Trade Adjustment Assistance (TAA). The petitioner concluded that because the business of the subject firm is ''completely reliant on the manufacturing industry in our town'', and because the businesses ''discontinued their flights with us due to their downsizing'', the workers of the subject firm should also be eligible for TAA as downstream producers to these certified companies.

In order to make an affirmative determination and issue a certification of eligibility to apply for adjustment assistance on the basis of the secondary impact, the workers' firm has to be a downstream producer which performs additional, value-added production processes or services directly for another firm for articles or services with respect to which a group of workers in such other firm has been certified.

The investigation revealed that workers of Atlantic Southeast Airlines, a subsidiary of Skywest, Inc., Airport Customer Service Division, Fort Smith, Arkansas provided airline customer services, including airport station management, ticketing and baggage. The workers of the subject firm did not perform additional, value-added production processes or services directly to any of the certified primary firms during the period under investigation. Thus the subject firm workers are not eligible for TAA as downstream producers under secondary impact.

The petitioner did not supply facts not previously considered; nor provide additional documentation indicating that there was either (1) a mistake in the determination of facts not previously considered or (2) a misinterpretation of facts or of the law justifying reconsideration of the initial determination.

After careful review of the request for reconsideration, the Department determines that 29 CFR 90.18(c) has not been met.

Conclusion

After review of the application and investigative findings, I conclude that there has been no error or misinterpretation of the law or of the facts which would justify reconsideration of the Department of Labor's prior decision. Accordingly, the application is denied.

Signed in Washington, DC, this 5th day of November 2009.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–29148 Filed 12–7–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–71,968]

Henniges Automotives, Farmington Hills, MI; Notice of Termination of Investigation

Pursuant to Section 223 of the Trade Act of 1974, as amended, an investigation was initiated in response to a petition filed on August 10, 2009 by Company official on behalf of workers of Henniges Automotive, Farmington Hills, Michigan.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC this 3rd day of September 2009.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–29181 Filed 12–7–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–71,912]

Philips Products, Inc., Clarksville, TX; Notice of Termination of Investigation

Pursuant to Section 223 of the Trade Act of 1974, as amended, an investigation was initiated in response to a petition filed on August 4, 2009, by a company official on behalf of workers of Philips Products, Inc., Clarksville, Texas.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC this 3rd day of September, 2009.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–29179 Filed 12–7–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–71,833]

E.I. Dupont, Circleville, OH; Notice of Termination of Investigation

Pursuant to Section 223 of the Trade Act of 1974, as amended, an investigation was initiated in response to a petition filed on July 28, 2009 by a one-stop operator/partner on behalf of workers of E.I. Dupont, Circleville, Ohio.

The petition is a duplicate of petition number TA–W–71,750, filed on July 17, 2009 that is subject of an ongoing investigation. Therefore, further investigation in this case would serve no purpose and the investigation has been terminated.

Signed at Washington, DC, this 13th day of August 2009.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–29177 Filed 12–7–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–71,689]

Clopay Building Products, Baldwin, WI; Notice of Termination of Investigation

Pursuant to Section 223 of the Trade Act of 1974, as amended, an investigation was initiated in response to a petition filed on July 16, 2009 by a company official on behalf of workers of Clopay Building Products, Baldwin, Wisconsin.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC, this 8th day of September 2009.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–29176 Filed 12–7–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–71,516]

IHSS/Nazi Mokhtari, Mission Hills, CA; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated in response to a petition filed on July 2, 2009, by a State Workforce Officer on behalf of workers of IHSS/Nazi Mokhtari, Mission Hills, California.

The petitioner has requested that the petition be withdrawn. Accordingly, the investigation has been terminated.

Signed at Washington, DC, this 1st day of September 2009.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–29174 Filed 12–7–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–71,276]

Health Net, Inc., Information Technology Group, Shelton, CT; Notice of Termination of Investigation

Pursuant to Section 223 of the Trade Act of 1974, as amended, an investigation was initiated in response to a petition filed on June 18, 2009 on behalf of workers of Health Net, Inc., Information Technology Group, Shelton, Connecticut.

The petitioning group of workers is covered by an active certification, (TA–W–70,166J) which expires on August 25, 2011. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed at Washington, DC, this 25th day of August 2009.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–29172 Filed 12–7–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–71,086]

Apria Healthcare, Foothill Ranch, CA; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated in response to a petition filed on June 9, 2009, by a company official, on behalf of workers of Apria Healthcare, Foothill Ranch, California, and seven other affiliated locations.

The petition is a duplicate of petition number TA–W–71,054, filed on June 8, 2009, that is the subject of an ongoing investigation. Therefore further investigation in this case would serve no purpose and the investigation has been terminated.

Signed at Washington, DC, this 14th of August 2009.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–29170 Filed 12–7–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration vv

[TA–W–71,073]

GMAC Insurance, Winston Salem, NC; Notice of Termination of Investigation

Pursuant to Section 223 of the Trade Act of 1974, as amended, an investigation was initiated in response to a petition filed on June 9, 2009, on behalf of workers of GMAC Insurance, Winston Salem, North Carolina.

The petitioning group of workers is covered by an active certification, (TA–W–70,945) which expires on June 17, 2011. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed at Washington, DC this 27th day of August 2009.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–29169 Filed 12–7–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–70,983]

Washington Mutual Jacksonville, FL; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated in response to a petition filed on June 5, 2009, by a One-Stop Operator on behalf of workers of Washington Mutual, Jacksonville, Florida.

The petitioner has requested that the petition be withdrawn. Accordingly, the investigation has been terminated.

Signed at Washington, DC, this 25th day of August 2009.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–29167 Filed 12–7–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–71,917]

Brown Shoe, Fredericktown, MO; Notice of Termination of Investigation

Pursuant to Section 223 of the Trade Act of 1974, as amended, an investigation was initiated in response to a petition filed on July 27, 2009, by a representative of Local 655 affiliated with United Food & Commercial Workers International Union on behalf of workers of Brown Shoe, Fredericktown, Missouri.

The petitioning group of workers is covered by an earlier petition (TA–W–71,828) filed on July 28, 2009, that is the subject of an ongoing investigation for which a determination has not yet been issued. Further investigation in this case would duplicate efforts and serve no purpose; therefore the investigation under this petition has been terminated.

Signed at Washington, DC, this 2nd day of September 2009.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–29180 Filed 12–7–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–71,885]

Clarcor Air Filtration Products, Rockford, IL; Notice of Termination of Investigation

Pursuant to Section 223 of the Trade Act of 1974, as amended, an investigation was initiated in response to a petition filed on July 28, 2009 by a company official on behalf of workers of Clarcor Air Filtration Products, Rockford, Illinois.

The petitioning group of workers is covered by an earlier petition (TA–W–71,844) filed on July 29, 2009 that is the subject of an ongoing investigation for which a determination has not yet been issued. Further investigation in this case would duplicate efforts and serve no purpose; therefore the investigation under this petition has been terminated.

Signed at Washington, DC this 1st day of September 2009.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–29178 Filed 12–7–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–71,284]

Airtex Products LP, Fairfield, IL; Notice of Termination of Investigation

Pursuant to Section 223 of the Trade Act of 1974, as amended, an investigation was initiated on June 18, 2009 in response to a worker petition filed by a company official on behalf of workers of Airtex Products LP, Fairfield, Illinois.

The petitioning group of workers is covered by an earlier petition (TA–W–70,934) filed on June 3, 2009 that is the subject of an ongoing investigation for which a determination has not yet been issued. Consequently, further investigation in this case would serve no purpose, and the investigation under this petition has been terminated.

Signed at Washington, DC, this 19th day of August 2009.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–29173 Filed 12–7–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–71,654]

DeLong Sportswear, Pella, IA; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated in response to a petition filed on July 14, 2009 by an Iowa State Workforce Official on behalf of workers of DeLong Sportswear, Pella, Iowa.

The petitioner has requested that the petition be withdrawn. Accordingly, the investigation has been terminated.

Signed at Washington, DC, this 12th day of August 2009.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

Editorial Note: This document was received by the Office of the Federal Register on December 3, 2009.

[FR Doc. E9–29175 Filed 12–7–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–71,195]

Timken—Bucyrus Operations, Bucyrus, OH; Notice of Termination of Investigation

Pursuant to Section 223 of the Trade Act of 1974, as amended, an investigation was initiated in response to a petition filed on June 12, 2009 by a company official on behalf of workers of Timken—Bucyrus Operations, Bucyrus, Ohio.

The petitioner has requested that the petition be withdrawn. Accordingly, the investigation has been terminated.

Signed at Washington, DC this 17th day of August 2009.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–29171 Filed 12–7–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–71,039]

Mitsubishi Electric Automotive America, Inc., Mason, OH; Notice of Termination of Investigation

Pursuant to Section 223 of the Trade Act of 1974, as amended, an investigation was initiated in response to a petition filed on June 8, 2009 by a company official on behalf of workers of Mitsubishi Electric Automotive America, Inc., Mason, Ohio.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC this 17th day of August 2009.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–29168 Filed 12–7–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–70,818]

Classic Moving and Storage, Inc., and Boyles Distinctive Furniture, Inc., Wholly-Owned Subsidiaries of Hendricks Furniture Group, LLC, Conover, NC; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on June 1, 2009, in response to a petition filed by a former company official on behalf of workers of Classic Moving and Storage, Inc., and Boyles Distinctive Furniture, Inc., wholly-owned subsidiaries of Hendricks Furniture Group, LLC, Conover, North Carolina.

The petitioning groups of workers are covered by an active certification, (TA–W–64,289) which expires on January 9, 2011. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed at Washington, DC, this 13th day of August 2009.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–29164 Filed 12–7–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–70,532]

VWR International, LLC, Bridgeport, NJ; Notice of Termination of Investigation

Pursuant to Section 223 of the Trade Act of 1974, as amended, an investigation was initiated in response to a petition filed on May 26, 2009 by a one stop operator on behalf of workers of VWR International, LLC., Bridgeport, New Jersey.

The petitioning group of workers is covered by an active certification, (TA–W–70,200) which expires on July 2, 2011. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed at Washington, DC this 25th day of August 2009.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–29162 Filed 12–7–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–70,495]

Sipco, Inc., Saegertown, PA; Notice of Termination of Investigation

Pursuant to Section 223 of the Trade Act of 1974, as amended, an investigation was initiated on May 22, 2009 in response to a worker petition filed on behalf of workers of Sipco, Inc., Saegertown, PA.

The petitioning group of workers is covered by an earlier petition (TA–W–70,457) filed on May 22, 2009 that is the subject of an ongoing investigation for which a determination has not yet been issued. Consequently, further investigation in this case would serve no purpose, and the investigation under this petition has been terminated.

Signed at Washington, DC, this 19th day of August 2009.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–29161 Filed 12–7–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–70,644]

Celanese Pampa, TX; Notice of Termination of Investigation

Pursuant to Section 223 of the Trade Act of 1974, as amended, an investigation was initiated in response to a petition filed on May 28, 2009 by a company official on behalf of workers of Celanese, Pampa, Texas.

The petitioner has requested that the petition be withdrawn. Accordingly, the investigation has been terminated.

Signed at Washington, DC this 21st day of August 2009.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–29163 Filed 12–7–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–70,944]

Enterprise Automotive Systems, Inc., Warren, MI; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated in response to a petition filed by a company fficial and union representative (President) on June 4, 2009, on behalf of workers of Enterprise Automotive Systems, Inc., Warren, Michigan.

The petitioning group of workers is covered by an earlier petition (TA–W–70,593) filed on May 26, 2009, that is subject of an ongoing investigation for which a determination has not yet been issued. Therefore, further investigation in this case would serve no purpose and the investigation has been terminated.

Signed at Washington, DC, this 25th of August 2009.

Elliott S. Kushner,

Certifying Officer, Division ofTrade Adjustment Assistance.

[FR Doc. E9–29166 Filed 12–7–09; 8:45 am]

BILLING CODE 4510–N–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–70,862]

Toshiba America Business Solutions, Inc., Electronics Imaging Division, Irvine, CA; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on June 2, 2009, in response to a petition filed by a California State Trade Adjustment Assistance Specialist on behalf of workers of Toshiba America Business Solutions, Inc., Electronics Imaging Division, Irvine, California.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC, this 14th day of August 2009.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–29165 Filed 12–7–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–70,491]

Sipco, Inc., Meadville, PA; Notice of Termination of Investigation

Pursuant to Section 223 of the Trade Act of 1974, as amended, an investigation was initiated on May 22, 2009 in response to a worker petition filed on behalf of workers of Sipco, Inc., Meadville, Pennsylvania.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed in Washington, DC, this 19th day of August 2009.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–29160 Filed 12–7–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–70,337]

Milliken & Company, Hatch Plant, Columbus, OH; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated in response to a petition filed on May 20, 2009, by the workers of Milliken & Company, Hatch Plant, Columbus, Ohio.

The petition is a duplicate petition (TA–W–70,335), filed on May 19, 2009, that is subject of an ongoing investigation. Therefore, further investigation in this case would serve no purpose and the investigation has been terminated.

Signed at Washington, DC, this 19th of August 2009.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–29159 Filed 12–7–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–70,219]

Vescom Corporation, Baileyville, ME; Notice of Termination of Investigation

Pursuant to Section 223 of the Trade Act of 1974, as amended, an investigation was initiated in response to a petition filed on May 19, 2009 by a state agency representative on behalf of workers of Vescom Corporation, Baileyville, Maine.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC, this 26th day of August 2009.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–29158 Filed 12–7–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–70,218]

Ryder Logistics, Ledgewood, NJ; Notice of Termination of Investigation

Pursuant to Section 223 of the Trade Act of 1974, as amended, an investigation was initiated in response to a petition filed on May 19, 2009 by a state agency representative on behalf of workers of Ryder Logistics, Ledgewood, New Jersey.

The petitioning group of workers is covered by an active certification, (TA–W–63,575, as amended) which expires on July 16, 2010. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed at Washington, DC this 26th day of August 2009.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–29157 Filed 12–7–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–72,071]

Laird Technologies, Earth City, MO; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated in response to a petition filed on August 19, 2009, by a company official on behalf of workers of Laird Technologies, Earth City, Missouri.

The petitioner has requested that the petition be withdrawn. Accordingly, the investigation has been terminated.

Signed at Washington, DC, this 4th day of September 2009.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–29156 Filed 12–7–09; 8:45 am]

BILLING CODE 4510–FN–P

LEGAL SERVICES CORPORATION

Sunshine Act Meeting of the Board of Directors—Telephonic

TIME AND DATE: The Legal Services Corporation's Board of Directors will meet, on December 15, 2009 via conference call. The meeting will begin at 2:30 p.m. Eastern Time, and continue until conclusion of the Board's agenda.

LOCATION: Legal Services Corporation Headquarters, 3rd Floor Conference Center, 3333 K Street, NW., Washington, DC.

PUBLIC OBSERVATION BY TELEPHONE: Members of the public that wish to listen live to those portions of the meeting open to the public may do so by following the telephone call-in directions provided below. Please keep your telephone muted while listening in order to eliminate background noises. Comments from the public may be solicited from time-to-time by the Committee's Chairperson.

CALL-IN DIRECTIONS:

- Call toll-free number (1.866.451.4981);
- When prompted, enter the following numeric pass code: (3899506694); followed by # sign
- When connected to the call, please ''mute'' your telephone immediately. You may do so by dialing ''*6.''

STATUS OF MEETING: Open, except that a portion of the meeting may be closed to the public pursuant to a vote of the Board of Directors so the Board may consider and perhaps act on a recommendation as to selection of an Interim President for LSC. A *verbatim* written transcript will be made of the closed session of the Committee meeting. However, the transcript of any portions of the closed session falling within the relevant provisions of the Government in the Sunshine Act, 5 U.S.C. 552b(c)(6), and the corresponding provisions of the Legal Services Corporation's implementing regulation, 45 CFR 1622.5(e), will not be available for public inspection. A copy of the General Counsel's Certification that in his opinion the closing is authorized by law will be available upon request.

MATTERS TO BE CONSIDERED:

Agenda

Open Session

1. Approval of agenda

Closed Session

3. Consider and act on recommendation as to selection of an Interim President for LSC

Open Session

2. Consider and act on other business
3. Public Comment
4. Consider and act on motion to adjourn meeting

CONTACT PERSON FOR INFORMATION: Katherine Ward, Executive Assistant to the Vice President & General Counsel, at

(202) 295–1500. Questions may be sent by electronic mail to *FR_NOTICE_QUESTIONS@lsc.gov.*

Special Needs: Upon request, meeting notices will be made available in alternate formats to accommodate visual and hearing impairments. Individuals who have a disability and need an accommodation to attend the meeting may notify Katherine Ward, at (202) 295–1500 or *FR_NOTICE_QUESTIONS@lsc.gov.*

Dated: December 3, 2009.

Mattie Cohan,

Senior Assistant General Counsel.

[FR Doc. E9–29263 Filed 12–4–09; 11:15 am]

BILLING CODE 7050–01–P

NATIONAL SCIENCE FOUNDATION

Agency Information Collection Activities: Comment Request

AGENCY: National Science Foundation.

ACTION: Submission for OMB review; comment request.

SUMMARY: The National Science Foundation (NSF) has submitted the following information collection requirement to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. This is the second notice for public comment; the first was published in the **Federal Register** at 74 FR 27829, and no comments were received. NSF is forwarding the proposed renewal submission to the Office of Management and Budget (OMB) for clearance simultaneously with the publication of this second notice. The full submission may be found at: *http://www.reginfo.gov/public/do/PRAMain.* Comments regarding (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; or (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Office of Information and Regulatory Affairs of OMB, Attention: Desk Officer for National Science Foundation, 725 17th Street, NW., Room 10235, Washington, DC 20503, and to Suzanne H. Plimpton, Reports Clearance Officer, National Science Foundation, 4201 Wilson Boulevard, Suite 295, Arlington, Virginia 22230 or send e-mail to *splimpto@nsf.gov.* Comments regarding this information collection are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling 703–292–7556.

FOR FURTHER INFORMATION CONTACT: Suzanne H. Plimpton at (703) 292–7556 or send e-mail to *splimpto@nsf.gov.* Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

NSF may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

SUPPLEMENTARY INFORMATION:

Request for Clearance for Program Review of the Science and Technology Centers (STC): Integrative Partnership Program.

Title of Collection: Program Review of the National Science Foundation's (NSF) Science and Technology Centers: Integrative Partnership Program.

OMB Control No.: 3145–(NEW)

Abstract:

The National Science Foundation (NSF) requests a three-year clearance for research, evaluation and data collection (*e.g.* surveys and interviews) from graduate student and postdoctoral participants in the Science and Technology Centers: Integrative Partnerships (STC) Program. Other STC stakeholders typically are limited to PhD scientists and engineers and faculty and administrators from universities and not-for-profit institutions and industrial/business partners, NSF employees and former NSF employees and intergovernmental personnel act (IPA) appointees.

The STC program provides multiyear (up to ten years) support to STCs as continuing awards that are among the largest (up to $4 million a year) awarded by the National Science Foundation (NSF). This support fuels innovation and builds intellectual and physical infrastructure within and among disciplines in the integrative conduct of research, education, and knowledge transfer. The STC program currently funds a total of 17 Centers—five beginning in 2000, six beginning in 2002, two beginning in 2005, and four beginning in 2006. STCs conduct world-class research through partnerships among academic institutions, national laboratories, industrial organizations, and/or other public/private entities, and via international collaborations, as appropriate. STCs enable and foster excellence in education, the integration of research and education, and the creation of bonds between learning and inquiry so that discovery and creativity more fully support the learning process. In addition, STCs capitalize on diversity through participation in Center activities and demonstrate leadership in the involvement of groups underrepresented in science and engineering.

Based on prior evaluations of the program, the National Science Board (NSB) approved the continuation of Science and Technology Centers through the establishment of new program solicitations and several new competitions. As part of the continuation, the NSB required the program to conduct a program evaluation of the outcomes and impact of the program seven years after the first new cohort of Centers were established (Memorandum to Members of the National Science Board, February 13, 1997).

A related data collection effort that consists of general grantee reporting is approved for program monitoring under OMB 3145–0194. To enable effective oversight of its investment, the NSF requires that each currently funded Center submit an annual progress report that describes all activities of the Center; each existing Center began submitting an annual report at the end of its first year. While a database of Centers' characteristics, activities, and outcomes has been created using data from these annual reports, supplemental information is required to fulfill the evaluative needs of the program.

NSF has planned a new program review of STC, and has contracted with Abt Associates Inc. to provide for analytic and technical support, to include data collection and analysis, for an expert peer review of the program. To help fulfill the evaluation needs of the program, NSF has planned to collect data that is designed to explore the structures and processes the STCs and their participating universities have in place for developing the human capital of program participants and for fostering a variety of career paths. The primary methods of data collection will include data gathering from open sources and

from records at NSF and grantee centers and from surveys of program participants. There are a bounded (or limited) number of respondents within the general public who will be affected by this research, including former graduate student and postdoctoral fellow participants of the centers. NSF will use the STC program evaluation data and analyses to provide members of an expert peer review panel with information about the program's role in the talent development and on the career paths taken by students who participated in STCs and were involved in particular STC activities.

Respondents: Individuals or households, Federal Government, and not-for-profit institutions.

Estimated Number of Respondents: 1,700.

Burden on the Public: 850 hours.

Dated: December 3, 2009.

Suzanne H. Plimpton,

Reports Clearance Officer, National Science Foundation.

[FR Doc. E9–29221 Filed 12–7–09; 8:45 am]

BILLING CODE 7555–01–P

NATIONAL SCIENCE FOUNDATION

Agency Information Collection Activities: Comment Request

AGENCY: National Science Foundation.

ACTION: Submission for OMB review; comment request.

SUMMARY: The National Science Foundation (NSF) has submitted the following information collection requirement to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. This is the second notice for public comment; the first was published in the **Federal Register** at 74 FR 48316, and no comments were received. NSF is forwarding the proposed renewal submission to the Office of Management and Budget (OMB) for clearance simultaneously with the publication of this second notice. The full submission may be found at: *http://www.reginfo.gov/public/do/PRAMain.* Comments regarding (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; or (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Office of Information and Regulatory Affairs of OMB, Attention: Desk Officer for National Science Foundation, 725—17th Street, NW., Room 10235, Washington, DC 20503, and to Suzanne H. Plimpton, Reports Clearance Officer, National Science Foundation, 4201 Wilson Boulevard, Suite 295, Arlington, Virginia 22230 or send e-mail to *splimpto@nsf.gov.* Comments regarding this information collection are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling 703–292–7556.

FOR FURTHER INFORMATION CONTACT: Suzanne H. Plimpton at (703) 292–7556 or send e-mail to *splimpto@nsf.gov.* Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

NSF may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

SUPPLEMENTARY INFORMATION: *Title of Collection:* Revitalizing Computing Pathways (CPATH) in Undergraduate Education Program Evaluation.

OMB Number: 3145–NEW.

Type of request: New.

Abstract: The CPATH program was established by the National Science Foundation's Computer & Information Science & Engineering (CISE) division with a vision towards preparing a U.S. workforce with the computing competencies and skills imperative to the Nation's health, security, and prosperity in the 21st century. This workforce includes a cadre of computing professionals prepared to contribute to sustained U.S. leadership in computing in a wide range of application domains and career fields, and a broader professional workforce with knowledge and understanding of critical computing concepts, methodologies, and techniques. To achieve this vision, CISE/CPATH is calling for colleges and universities to work together and with other stakeholders (industry, professional societies, and other types of organizations) to formulate and implement plans to revitalize undergraduate computing education in the United States. The full engagement of faculty and other individuals in CISE disciplines will be critical to success. Successful CPATH projects will be systemic in nature, address a broad range of issues, and have significant potential to contribute to the transformation and revitalization of undergraduate computing education on a national scale.

The qualitative data collection of this program evaluation will document CPATH program strategies utilized in infusing computational thinking across different contexts and disciplines, examine the development of communities of practitioners and the dissemination of best practices around computational thinking, and analyze preliminary evidence for how the CPATH program is preparing students for career options in the STEM workforce.

Five overarching evaluation questions will guide this program evaluation:

(1) How is the CPATH program infusing computational thinking into a wide range of disciplines serving undergraduate education?

(2) What is the evidence that university and community college departments and faculty are integrating computational thinking into their courses?

(3) How are undergraduate students benefiting from participating in CPATH projects?

(4) What is the evidence that the CPATH program is developing communities of practitioners that regularly share best practices across different contexts and disciplinary boundaries?

(5) How is the CPATH program promoting sustainable multi-sector partnerships that represent a broad range of stakeholders (*e.g.,* industry, higher education, K12) and contribute to workforce development that supports continued U.S. leadership in innovation?

Answers to these questions will be obtained through the use of mixed evaluation methods including document analyses, site visit interviews, and telephone interviews with selected CPATH grant participants including principal investigators, staff, faculty, administrators, students, and external partners. Participation in CPATH program evaluation activities is a mandatory requirement for all CPATH awardees in accordance with the

America Competes Act, H.R. 2272, and implementing directives.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 1.75 hours per response.

Respondents: Individuals.

Estimated Number of Responses per Form: 200.

Estimated Total Annual Burden on Respondents: 350 hours (200 respondents at 1.75 hours per response)

Frequency of Response: One time.

Dated: December 2, 2009.

Suzanne H. Plimpton,

Reports Clearance Officer, National Science Foundation.

[FR Doc. E9–29133 Filed 12–7–09; 8:45 am]

BILLING CODE 7555–01–P

NATIONAL SCIENCE FOUNDATION

Notice of Record of Decision

AGENCY: National Science Foundation.

ACTION: Notice of Record of Decision.

SUMMARY: On December 3, 2009, the National Science Foundation (NSF) issued a Record of Decision (ROD) approving the funding for the construction of the Advanced Technology Solar Telescope (ATST) Project at the Preferred Mees site located within the Haleakalā High Altitude Observatory on the Island of Maui, Hawai'i. The decision to fund the ATST is in response to a construction proposal submitted by the National Solar Observatory in 2004. The ATST is founded on one of NSF's fundamental missions, which is to support the scientific community's objectives to achieve unprecedented progress in solar observation. Although major adverse environmental impacts will result, the construction of the ATST at the Preferred Mees site represents an opportunity to implement a critical and unique astronomical resource that is expected to be useful and innovative for several decades to come. Increasing our understanding of the Sun and its ability to affect life on Earth will go a long way toward helping us predict certain catastrophic events and provide us with the opportunity to address the potential consequences.

Prior to issuance of the ROD, a Final Environmental Impact Statement (FEIS) for the ATST Project, which was prepared as a joint Federal and State of Hawai'i document in compliance with the Federal National Environmental Policy Act, 42 U.S.C. 4321, *et seq.* (NEPA), and the State of Hawai'i Chapter 343, Hawai'i Revised Statutes, was completed and made available to the public in late July of 2009. Three alternatives were analyzed in the FEIS, including the Preferred Mees site, the Alternative Reber Circle site (also located within HO), and the No-Action Alternative. The Preferred Mees site, which is also the environmentally preferred alternative was selected in the ROD. As explained more thoroughly in both the FEIS and ROD, construction and operation of the ATST at the Preferred Mees site will result in several major, adverse impacts to various resources, including cultural resources, viewsheds, and noise. While NSF will not be able to reduce all adverse impacts to lower intensity levels, the scientific gains that the ATST will provide have the potential to yield a significant benefit to life on Earth. NSF has, however, committed to implementation of a full suite of mitigation measures, which represent a dedicated, multi-year effort by NSF to address and reduce adverse impacts.

The ROD also follows NSF's completion of its compliance obligations under Section 106 of the National Historic Preservation Act and the Endangered Species Act. The ROD is now available on the Internet at: *http://atst.nso.edu/nsf-env* in Adobe® portable document format (PDF). Limited hard copies of the ROD are also available, on a first request basis, by contacting the NSF contact, Craig Foltz, Ph.D., ATST Program Director, 4201 Wilson Boulevard, Room 1045, Arlington, VA 22230, *Telephone:* 703–292–4909, *e-mail: cfoltz@nsf.gov*.

FOR FURTHER INFORMATION CONTACT: Craig Foltz, Ph.D., ATST Program Manager, National Science Foundation, Division of Astronomical Sciences, 4201 Wilson Boulevard, Room 1045, Arlington, VA 22230; *Telephone:* 703–292–4909, *Fax:* 703–292–9034, *E-mail: cfoltz@nsf.gov*.

Dated: December 3, 2009.

Craig Foltz,

ATST Program Manager, National Science Foundation.

[FR Doc. E9–29229 Filed 12–7–09; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2009–0513]

Applications and Amendments to Facility Operating Licenses Involving Proposed No Significant Hazards Considerations and Containing Sensitive Unclassified Non-Safeguards Information and Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information

I. Background

Pursuant to section 189a. (2) of the Atomic Energy Act of 1954, as amended (the Act), the U.S. Nuclear Regulatory Commission (the Commission or NRC staff) is publishing this notice. The Act requires the Commission publish notice of any amendments issued, or proposed to be issued and grants the Commission the authority to issue and make immediately effective any amendment to an operating license upon a determination by the Commission that such amendment involves no significant hazards consideration, notwithstanding the pendency before the Commission of a request for a hearing from any person.

This notice includes notices of amendments containing sensitive unclassified non-safeguards information (SUNSI).

Notice of Consideration of Issuance of Amendments to Facility Operating Licenses, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing

The Commission has made a proposed determination that the following amendment requests involve no significant hazards consideration. Under the Commission's regulations in Title 10 of the *Code of Federal Regulations* (10 CFR), Section 50.92, this means that operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. The basis for this proposed determination for each amendment request is shown below.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendment until the expiration of 60 days after the date of publication of this notice. The Commission may issue the license amendment before expiration of the 60-day period provided that its final determination is that the amendment involves no significant hazards consideration. In addition, the Commission may issue the amendment prior to the expiration of the 30-day comment period should circumstances change during the 30-day comment period such that failure to act in a timely way would result, for example in derating or shutdown of the facility. Should the Commission take action prior to the expiration of either the comment period or the notice period, it will publish in the **Federal Register** a notice of issuance. Should the Commission make a final No Significant Hazards Consideration Determination, any hearing will take place after issuance. The Commission expects that the need to take this action will occur very infrequently.

Written comments may be submitted by mail to the Chief, Rulemaking and Directives Branch (RDB), TWB–05–B01M, Division of Administrative Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and should cite the publication date and page number of this **Federal Register** notice. Written comments may also be faxed to the RDB at 301–492–3446. Documents may be examined, and/or copied for a fee, at the NRC's Public Document Room (PDR), located at One White Flint North, Public File Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland.

Within 60 days after the date of publication of this notice, any person(s) whose interest may be affected by this action may file a request for a hearing and a petition to intervene with respect to issuance of the amendment to the subject facility operating license. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's ''Rules of Practice for Domestic Licensing Proceedings'' in 10 CFR Part 2. Interested person(s) should consult a current copy of 10 CFR 2.309, which is available at the Commission's PDR, located at One White Flint North, Public File Area 01F21, 11555 Rockville Pike (first floor), Rockville, Maryland or at *http://www.nrc.gov/reading-rm/doc-collections/cfr/part002/part002–0309.html.* Publicly available records will be accessible from the Agencywide Documents Access and Management System's (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm.html.* If a request for a hearing or petition for leave to intervene is filed within 60 days, the Commission or a presiding officer designated by the Commission or by the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the Chief Administrative Judge of the Atomic Safety and Licensing Board will issue a notice of a hearing or an appropriate order.

As required by 10 CFR 2.309, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following general requirements: (1) The name, address, and telephone number of the requestor or petitioner; (2) the nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding; (3) the nature and extent of the requestor's/petitioner's property, financial, or other interest in the proceeding; and (4) the possible effect of any decision or order which may be entered in the proceeding on the requestor's/petitioner's interest. The petition must also set forth the specific contentions which the petitioner/requestor seeks to have litigated at the proceeding.

Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner/requestor shall provide a brief explanation of the bases for the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner/requestor intends to rely in proving the contention at the hearing. The petitioner/requestor must also provide references to those specific sources and documents of which the petitioner is aware and on which the petitioner/requestor intends to rely to establish those facts or expert opinion. The petition must include sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitle the petitioner/requestor to relief. A petitioner/requestor who fails to satisfy these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing.

If a hearing is requested, and the Commission has not made a final determination on the issue of no significant hazards consideration, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held. If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment. If the final determination is that the amendment request involves a significant hazards consideration, any hearing held would take place before the issuance of any amendment.

All documents filed in NRC adjudicatory proceedings, including a request for hearing, a petition for leave to intervene, any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene, and documents filed by interested governmental entities participating under 10 CFR 2.315(c), must be filed in accordance with the NRC E-Filing rule, (August 28, 2009; 72 FR 49139). The E-Filing process requires participants to submit and serve all adjudicatory documents over the internet, or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek an exemption in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least ten (10) days prior to the filing deadline, the participant should contact the Office of the Secretary by e-mail at *hearing.docket@nrc.gov,* or by telephone at (301) 415–1677, to request (1) a digital ID certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a request or petition for hearing (even in instances in which the participant, or its counsel or representative, already holds an NRC-

issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the hearing in this proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals/apply-certificates.html.* System requirements for accessing the E-Submittal server are detailed in NRC's ''Guidance for Electronic Submission,'' which is available on the agency's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* Participants may attempt to use other software not listed on the Web site, but should note that the NRC's E-Filing system does not support unlisted software, and the NRC Help Desk will not be able to offer assistance in using unlisted software.

If a participant is electronically submitting a document to the NRC in accordance with the E-Filing rule, the participant must file the document using the NRC's on-line, web-based submission form. In order to serve documents through EIE, users will be required to install a web browser plug-in from the NRC Web site. Further information on the web-based submission form, including the installation of the web browser plug-in, is available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.*

Once a participant has obtained a digital ID certificate and a docket has been created, the participant can then submit a request for hearing or petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with NRC guidance available on the NRC public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* A filing is considered complete at the time the documents are submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an e-mail notice confirming receipt of the document. The E-Filing system also distributes an e-mail notice that provides access to the document to the NRC Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request/petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically using the agency's adjudicatory E-Filing system may seek assistance by contacting the NRC Meta-System Help Desk through the ''Contact Us'' link located on the NRC Web site at *http://www.nrc.gov/site-help/e-submittals.html,* by e-mail at *MSHD.Resource@nrc.gov,* or by a toll-free call at (866) 672–7640. The NRC Meta-System Help Desk is available between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday, excluding government holidays.

Participants who believe that they have a good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR. 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville, Pike, Rockville, Maryland 20852, Attention: Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service. A presiding officer, having granted an exemption request from using E-Filing, may require a participant or party to use E-Filing if the presiding officer subsequently determines that the reason for granting the exemption from use of E-Filing no longer exists.

Documents submitted in adjudicatory proceedings will appear in NRC's electronic hearing docket which is available to the public at *http://ehd.nrc.gov/EHD_Proceeding/home.asp,* unless excluded pursuant to an order of the Commission, or the presiding officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

Petitions for leave to intervene must be filed no later than 60 days from December 8, 2009. Non-timely filings will not be entertained absent a determination by the presiding officer that the petition or request should be granted or the contentions should be admitted, based on a balancing of the factors specified in 10 CFR 2.309(c)(1)(i)–(viii).

Documents submitted in adjudicatory proceedings will appear in NRC's electronic hearing docket which is available to the public at *http://ehd.nrc.gov/ehd_proceeding/home.asp,* unless excluded pursuant to an order of the Commission, an Atomic Safety and Licensing Board, or a Presiding Officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

For further details with respect to this amendment action, see the application for amendment which is available for public inspection at the Commission's PDR, located at One White Flint North, Public File Area 01F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible electronically from the ADAMS Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html.* If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the PDR Reference staff at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr.resource@nrc.gov.*

South Carolina Electric & Gas Company, South Carolina Public Service Authority, Docket No. 50–395, Virgil C. Summer Nuclear Station, Unit No. 1, Fairfield County, SC

Date of amendment request: June 9, 2009.

Description of amendment request: This amendment request contains sensitive unclassified non-safeguards information (SUNSI). The amendment(s) would revise Technical Specification

5.3.1, ''Fuel Assemblies,'' by adding Optimized ZIRLO™ as an acceptable fuel rod cladding material. Additionally TS 6.9.1.11, ''Core Operating Limits Report,'' is being revised to add reports WCAP–12610–P–A, ''VANTAGE + Fuel Assembly Reference Core Report,'' April 1995, (*W* Proprietary) and CENPD–404–P–A, ''Optimized ZIRLO™,'' Addendum 1–A, July 2006, to the analytical methods used to determine the core operating limits.

Basis for proposed no significant hazards consideration determination: As required by Title 10 of the *Code of Federal Regulations* (10 CFR) 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

South Carolina Electric & Gas (SCE&G) has evaluated whether or not a significant hazards consideration is involved with the proposed amendment by focusing on the three standards set forth in 10 CFR 50.92, ''Issuance of amendment,'' as discussed below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed Technical Specification change is to add Optimized ZIRLO™ to the allowable or approved cladding materials to be used at Virgil C. Summer Nuclear Station (VCSNS). The proposed change of adding a cladding material does not result in an increase to the probability or consequences of an accident previously evaluated. Technical Specifications (TS 5.3.1) address the reactor core assemblies that specify, ''Each fuel assembly shall consist of 264 Zicaloy-4 or ZIRLO™ clad fuel rods* * *'' The proposed change will add Optimized ZIRLO™ to the approved fuel rod cladding materials. Additionally, reference to WCAP–12610–P–A, ''VANTAGE + Fuel Assembly Reference Core Report,'' April 1995 (*W* Proprietary) and WCAP–12610–P–A & CENPD–404–P–A, Addendum 1–A, ''Optimized ZIRLO™,'' July 2006 (*W* Proprietary) will be included to the listing of documents previously reviewed and approved by the NRC within TS 6.9.1.11.

Westinghouse Electric Company, LLC (Westinghouse) topical report WCAP–12610–P–A and CENPD–404–P–A, Addendum 1–A ''Optimized ZIRLO™,'' July 2006, provides the details and results of material testing of Optimized ZIRLO™ compared to standard ZIRLO™ as well as the material properties to be used in various models and methodologies when analyzing Optimized ZIRLO™. As the nuclear industry pursues longer operating cycles with increased fuel discharge burnup and fuel duty, the corrosion performance requirements for the nuclear fuel cladding become more demanding. Optimized ZIRLO™ was developed to meet these needs and provides a reduced corrosion rate while maintaining the benefits of mechanical strength and resistance to accelerated corrosion from abnormal chemistry conditions. In addition, fuel rod internal pressures (resulting from the increased fuel duty, use of integral fuel burnable absorbers, and corrosion/temperature feedback effects) have become more limiting with respect to fuel rod design criteria. Reducing the associated corrosion buildup and thus minimizing temperature feedback effects, provides additional margin to the fuel rod internal pressure design criterion. Therefore, adding Optimized ZIRLO™ to the approved fuel rod cladding materials does not result in an increase to the probability or consequences of an accident previously evaluated.

The U.S. Nuclear Regulatory Commission (NRC) has allowed use of Optimized ZIRLO™ fuel cladding material in Westinghouse fueled reactors provided that licensees ensure compliance with the conditions and limitations set forth within NRC Safety Evaluation (SE) for the topical report. The conditions and limitations are the current requirements and confirmation of these conditions is required as part of the core reload process.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed Technical Specification change is to add Optimized ZIRLO™ to the allowable or approved cladding materials to be used at VCSNS. Optimized ZIRLO™ was developed to provide a reduced corrosion rate while maintaining the benefits of mechanical strength and resistance to accelerated corrosion from abnormal chemistry conditions. The fuel rod design bases are established to satisfy the general and specific safety criteria addressed within FSAR Chapter 15, Accident Analyses and TSs. The fuel rods are designed to prevent excessive fuel temperatures, excessive internal rod gas pressures due to fission gas releases, and excessive cladding stresses and strains. Westinghouse topical report WCAP–12610–P–A and CENPD–404–P–A, Addendum 1–A ''Optimized ZIRLO™,'' July 2006, provides the details and results of material testing of Optimized ZIRLO™ compared to standard ZIRLO™ as well as the material properties to be used in various models and methodologies when analyzing Optimized ZIRLO™. The original design basis requirements have been maintained. Therefore, the change in material does not create the possibility of a new or different kind of accident or malfunction previously evaluated within the FSAR.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

The cladding material used in the fuel rods are designed and tested to prevent excessive fuel temperatures, excessive internal rod gas pressure due to fission gas releases and excessive cladding stresses and strains. Optimized ZIRLO™ was developed to meet these needs and provides a reduced corrosion rate while maintaining the benefits of mechanical strength and resistance to accelerated corrosion from abnormal chemistry conditions. Westinghouse topical report WCAP–12610–P–A and CENPD–404–P–A, Addendum 1–A ''Optimized ZIRLO™,'' July 2006, provides the details and results of material testing of Optimized ZIRLO™ compared to standard ZIRLO™ as well as the material properties to be used in various models and methodologies when analyzing Optimized ZIRLO™. The NRC has allowed use of Optimized ZIRLO™ fuel cladding material detailed within this topical report as detailed within their Safety Evaluation (SE). The original design basis requirements have been maintained. Therefore, the change in material does not result in a reduction in margin required to preclude or reduce the effects of an accident or malfunction previously evaluated in the FSAR.

Based on the above, SCE&G concludes that the proposed amendment present no significant hazards consideration under the standards set forth in 10 CFR 50.92(c), and, accordingly, a finding of no significant hazards consideration is justified.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

NRC Branch Chief: Gloria J. Kulesa.

Attorney for licensee: J. Hagood Hamilton, Jr., South Carolina Electric & Gas Company, Post Office Box 764, Columbia, South Carolina 29218.

Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information for Contention Preparation

South Carolina Electric & Gas Company, South Carolina Public Service Authority, Docket No. 50–395, Virgil C. Summer Nuclear Station, Unit No. 1, Fairfield County, SC

A. This Order contains instructions regarding how potential parties to this proceeding may request access to documents containing Sensitive Unclassified Non-Safeguards Information (SUNSI).

B. Within 10 days after publication of this notice of hearing and opportunity to petition for leave to intervene, any potential party who believes access to SUNSI is necessary to respond to this notice may request such access. A ''potential party'' is any person who intends to participate as a party by demonstrating standing and filing an admissible contention under 10 CFR 2.309. Requests for access to SUNSI submitted later than 10 days after publication will not be considered absent a showing of good cause for the late filing, addressing why the request could not have been filed earlier.

C. The requester shall submit a letter requesting permission to access SUNSI to the Office of the Secretary, U.S. Nuclear Regulatory Commission,

Washington, DC 20555–0001, Attention: Rulemakings and Adjudications Staff, and provide a copy to the Associate General Counsel for Hearings, Enforcement and Administration, Office of the General Counsel, Washington, DC 20555–0001. The expedited delivery or courier mail address for both offices is: U.S. Nuclear Regulatory Commission, 11555 Rockville Pike, Rockville, Maryland 20852. The e-mail address for the Office of the Secretary and the Office of the General Counsel are *Hearing.Docket@nrc.gov* and *OGCmailcenter@nrc.gov*, respectively.[1] The request must include the following information:

(1) A description of the licensing action with a citation to this **Federal Register** notice;

(2) The name and address of the potential party and a description of the potential party's particularized interest that could be harmed by the action identified in C.(1);

(3) The identity of the individual or entity requesting access to SUNSI and the requester's basis for the need for the information in order to meaningfully participate in this adjudicatory proceeding. In particular, the request must explain why publicly-available versions of the information requested would not be sufficient to provide the basis and specificity for a proffered contention;

D. Based on an evaluation of the information submitted under paragraph C.(3) the NRC staff will determine within 10 days of receipt of the request whether:

(1) There is a reasonable basis to believe the petitioner is likely to establish standing to participate in this NRC proceeding; and

(2) The requestor has established a legitimate need for access to SUNSI.

E. If the NRC staff determines that the requestor satisfies both D.(1) and D.(2) above, the NRC staff will notify the requestor in writing that access to SUNSI has been granted. The written notification will contain instructions on how the requestor may obtain copies of the requested documents, and any other conditions that may apply to access to those documents. These conditions may include, but are not limited to, the signing of a Non-Disclosure Agreement or Affidavit, or Protective Order[2] setting forth terms and conditions to prevent the unauthorized or inadvertent disclosure of SUNSI by each individual who will be granted access to SUNSI.

F. Filing of Contentions. Any contentions in these proceedings that are based upon the information received as a result of the request made for SUNSI must be filed by the requestor no later than 25 days after the requestor is granted access to that information. However, if more than 25 days remain between the date the petitioner is granted access to the information and the deadline for filing all other contentions (as established in the notice of hearing or opportunity for hearing), the petitioner may file its SUNSI contentions by that later deadline.

G. Review of Denials of Access.

(1) If the request for access to SUNSI is denied by the NRC staff either after a determination on standing and need for access, or after a determination on trustworthiness and reliability, the NRC staff shall immediately notify the requestor in writing, briefly stating the reason or reasons for the denial.

(2) The requester may challenge the NRC staff's adverse determination by filing a challenge within 5 days of receipt of that determination with: (a) The presiding officer designated in this proceeding; (b) if no presiding officer has been appointed, the Chief Administrative Judge, or if he or she is unavailable, another administrative judge, or an administrative law judge with jurisdiction pursuant to 10 CFR 2.318(a); or (c) if another officer has been designated to rule on information access issues, with that officer.

H. Review of Grants of Access. A party other than the requester may challenge an NRC staff determination granting access to SUNSI whose release would harm that party's interest independent of the proceeding. Such a challenge must be filed with the Chief Administrative Judge within 5 days of the notification by the NRC staff of its grant of access.

If challenges to the NRC staff determinations are filed, these procedures give way to the normal process for litigating disputes concerning access to information. The availability of interlocutory review by the Commission of orders ruling on such NRC staff determinations (whether granting or denying access) is governed by 10 CFR 2.311.[3]

I. The Commission expects that the NRC staff and presiding officers (and any other reviewing officers) will consider and resolve requests for access to SUNSI, and motions for protective orders, in a timely fashion in order to minimize any unnecessary delays in identifying those petitioners who have standing and who have propounded contentions meeting the specificity and basis requirements in 10 CFR Part 2. Attachment 1 to this Order summarizes the general target schedule for processing and resolving requests under these procedures.

It is so ordered.

Dated at Rockville, Maryland, this 30th day of November 2009.

For the Nuclear Regulatory Commission.

Annette L. Vietti-Cook,

Secretary of the Commission.

ATTACHMENT 1—GENERAL TARGET SCHEDULE FOR PROCESSING AND RESOLVING REQUESTS FOR ACCESS TO SENSITIVE UNCLASSIFIED NON-SAFEGUARDS INFORMATION IN THIS PROCEEDING

Day	Event/activity
0	Publication of **Federal Register** notice of hearing and opportunity to petition for leave to intervene, including order with instructions for access requests.
10	Deadline for submitting requests for access to Sensitive Unclassified Non-Safeguards Information (SUNSI) with information: Supporting the standing of a potential party identified by name and address; describing the need for the information in order for the potential party to participate meaningfully in an adjudicatory proceeding.
60	Deadline for submitting petition for intervention containing: (i) Demonstration of standing; (ii) all contentions whose formulation does not require access to SUNSI (+25 Answers to petition for intervention; +7 petitioner/requestor reply).

[1] While a request for hearing or petition to intervene in this proceeding must comply with the filing requirements of the NRC's ''E-Filing Rule,'' the initial request to access SUNSI under these procedures should be submitted as described in this paragraph.

[2] Any motion for Protective Order or draft Non-Disclosure Affidavit or Agreement for SUNSI must be filed with the presiding officer or the Chief Administrative Judge if the presiding officer has not yet been designated, within 30 days of the deadline for the receipt of the written access request.

[3] Requesters should note that the filing requirements of the NRC's E-Filing Rule (August 28, 2007; 72 FR 49139) apply to appeals of NRC staff determinations (because they must be served on a presiding officer or the Commission, as applicable), but not to the initial SUNSI request submitted to the NRC staff under these procedures.

ATTACHMENT 1—GENERAL TARGET SCHEDULE FOR PROCESSING AND RESOLVING REQUESTS FOR ACCESS TO SENSITIVE UNCLASSIFIED NON-SAFEGUARDS INFORMATION IN THIS PROCEEDING—Continued

Day	Event/activity
20	Nuclear Regulatory Commission (NRC) staff informs the requester of the staff's determination whether the request for access provides a reasonable basis to believe standing can be established and shows need for SUNSI. (NRC staff also informs any party to the proceeding whose interest independent of the proceeding would be harmed by the release of the information.) If NRC staff makes the finding of need for SUNSI and likelihood of standing, NRC staff begins document processing (preparation of redactions or review of redacted documents).
25	If NRC staff finds no "need" or no likelihood of standing, the deadline for petitioner/requester to file a motion seeking a ruling to reverse the NRC staff's denial of access; NRC staff files copy of access determination with the presiding officer (or Chief Administrative Judge or other designated officer, as appropriate). If NRC staff finds "need" for SUNSI, the deadline for any party to the proceeding whose interest independent of the proceeding would be harmed by the release of the information to file a motion seeking a ruling to reverse the NRC staff's grant of access.
30	Deadline for NRC staff reply to motions to reverse NRC staff determination(s).
40	(Receipt +30) If NRC staff finds standing and need for SUNSI, deadline for NRC staff to complete information processing and file motion for Protective Order and draft Non-Disclosure Affidavit. Deadline for applicant/licensee to file Non-Disclosure Agreement for SUNSI.
A	If access granted: Issuance of presiding officer or other designated officer decision on motion for protective order for access to sensitive information (including schedule for providing access and submission of contentions) or decision reversing a final adverse determination by the NRC staff.
A + 3	Deadline for filing executed Non-Disclosure Affidavits. Access provided to SUNSI consistent with decision issuing the protective order.
A + 28	Deadline for submission of contentions whose development depends upon access to SUNSI. However, if more than 25 days remain between the petitioner's receipt of (or access to) the information and the deadline for filing all other contentions (as established in the notice of hearing or opportunity for hearing), the petitioner may file its SUNSI contentions by that later deadline.
A + 53	(Contention receipt +25) Answers to contentions whose development depends upon access to SUNSI.
A + 60	(Answer receipt +7) Petitioner/Intervenor reply to answers.
>A + 60	Decision on contention admission.

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NUCLEAR REGULATORY COMMISSION

[Docket No. 70–143; NRC–2009–0529; EA–08–103]

Nuclear Fuel Services, Inc., License No. SNM–124, Erwin, TN; Confirmatory Order Modifying License (Effective Immediately)

I

Nuclear Fuel Services, Incorporated (NFS or Licensee) is the holder of Special Nuclear Materials License No. SNM–124 issued by the Nuclear Regulatory Commission (NRC or Commission) pursuant to 10 CFR part 70 on July 2, 1999. The license authorizes the operation of the NFS facility in accordance with the conditions specified therein. The facility is located on the Licensee's site in Erwin, Tennessee.

This Confirmatory Order is the result of an agreement reached during an Alternative Dispute Resolution (ADR) session conducted on September 15, 2009.

II

On April 20, 2006, an investigation was initiated by the NRC's Office of Investigations (OI) to review a March 2006 incident involving a senior executive at NFS who consumed alcohol less than five hours before a scheduled working tour. Based on the OI investigation and subsequent NRC staff review, the NRC advised NFS by letter dated January 7, 2009, of the identification of seven apparent violations:

(1) On March 9, 2006, a senior executive of NFS consumed alcohol less than five hours before a scheduled working tour, in apparent violation of 10 CFR 26.20.

(2) In March 2006, NFS failed to relieve the senior executive of his duties, failed to perform for-cause testing to determine his fitness for duty, and failed to implement management actions in apparent violation of 10 CFR 26.24, 10 CFR 26.27, and an NFS procedure.

(3) On April 5, 2006, NFS granted the senior executive Self-Referral Rehabilitation Status in the NFS Employee Assistance Program after he had been notified of an ongoing Fitness for Duty (FFD) investigation, in apparent violation of 10 CFR 26.20 and an NFS procedure.

(4) Between April 5 and 30, 2006, an NFS senior executive, in correspondence addressed to NRC, stated that the NFS senior executive had entered a substance abuse rehabilitation program when, in fact, he had not done so, in apparent violation of 10 CFR 70.9.

(5) On April 11, 2006, in apparent violation of 10 CFR 70.9, Completeness and accuracy of information, a senior NFS manager placed a letter in the senior executive's personnel file, and on June 8, 2006, NFS provided this letter, which was not accurate in all material respects, to the NRC. Specifically, the letter stated that the senior executive had entered a substance abuse rehabilitation program when, in fact, the senior executive had not done so.

(6) In May 2006, in apparent violation of 10 CFR 26.27 and the NFS FFD Program, NFS failed to determine the senior executive's fitness to safely and competently perform his duties and responsibilities before returning him to duty.

(7) NFS did not provide appropriate training to ensure that employees understood their roles and responsibilities in implementing its FFD Program and understood 10 CFR part 26 requirements.

III

On September 15, 2009, the NRC and NFS met in an ADR session mediated by a professional mediator, which was arranged through Cornell University's Institute on Conflict Resolution. ADR is a process in which a neutral mediator with no decision-making authority

assists the parties in reaching an agreement or resolving any differences regarding their dispute. This confirmatory order is issued pursuant to the agreement reached during the ADR process. The elements of the agreement consist of the following:

(1) NRC Inspection Report 070143/2006–008, dated July 14, 2006, documented a violation regarding an inadequate FFD procedure. By letter dated August 11, 2006, NFS responded to the violation and documented corrective actions. The referenced corrective actions clarified the procedural requirement associated with the consumption of alcohol within 5 hours of a scheduled working tour. Since the implementation of the FFD program in 1993, NFS' training program included the 5 hour abstinence period. NFS stated at the ADR meeting that these corrective actions are relevant to apparent violations (II.1) and (II.7) above.

(2) NFS agrees with the underlying circumstances which gave rise to the apparent violations discussed in the NRC's letter of January 7, 2009. However, NFS disagrees with apparent violations (II.3) and (II.6), and questions the appropriateness of apparent violation (II.5) because it involves a personnel document wholly internal to NFS and not intended for transmittal to the NRC.

(3) The NRC recognizes the ongoing efforts of NFS in implementation of the Safety Culture Improvement Plan as prescribed in the NRC's Confirmatory Order of February 21, 2007, and acknowledges the applicability of corrective actions and enhancements to preclude recurrence of the aforementioned apparent violations and to address the safety culture contributors to the apparent violations.

(4) Although the NRC continues to believe that violations occurred as stated in its letter of January 7, 2009, the NRC and NFS agree that the underlying issues will be adequately addressed by the corrective actions and enhancements documented in this Confirmatory Order.

(5) To preclude recurrence of the violations and to address NRC concerns, NFS completed the following corrective actions and enhancements:

a. NFS conducted a prompt investigation and subsequent review of the March 2006 FFD issue and identified factors that contributed to the FFD program failures.

b. Based on review of the above and in furtherance of other organizational improvements, NFS implemented and completed the following:

i. Disciplinary action and organizational change with respect to the senior executive;

ii. Modification of the FFD procedure and training for all existing and new employees to address the 5 hour abstinence period; and the NFS requirement to test if alcohol consumption or the smell of alcohol is suspected. NFS continues to advise its employees of actions to be taken when a supervisor is suspected of an FFD violation.

iii. Establishment of alternative avenues for reporting FFD related concerns and lowering the threshold for reporting. These include the creation of the position of Chief Nuclear Safety Officer, the implementation of an Employee Concerns Program (ECP), notification to employees of a corporate ethics hotline for reporting concerns, and introduction of an anonymous reporting feature as a part of the Corrective Action Program (CAP). The Chief Nuclear Safety Officer has a reporting chain which is independent of facility operations.

iv. The Medical Review Officer (MRO) attended comprehensive MRO training, and successfully completed a re-certification examination.

v. Implemented measures to assure continued Safety Conscious Work Environment (SCWE), to prevent, detect, and mitigate perceptions of harassment and intimidation, including an enhanced SCWE policy, a new organizational change process (which considers a potential chilling effect associated with organizational changes), new employee orientation and continuing communication with respect to the importance of a SCWE.

vi. Launched the ECP on April 6, 2009, with widespread advertisement of the program, including informational postings, newsletters, periodic e-mails from the Vice President of Operations, and distribution of informational brochures.

(6) In addition to the actions completed by NFS as discussed above, NFS agreed to additional corrective actions and enhancements, as fully delineated below in Section V of the Confirmatory Order.

(7) The NRC and NFS agree that the elements discussed in Sections III and V will be incorporated into a Confirmatory Order. The resulting Confirmatory Order will be considered by the NRC for any future assessment of NFS, as appropriate.

(8) NFS agrees to complete the items listed in Section V within 12 months of issuance of the Confirmatory Order.

(9) Within three months of completion of the terms of the Confirmatory Order, NFS will provide the NRC with a letter discussing its basis for concluding that the Confirmatory Order has been satisfied.

(10) In consideration of the commitments delineated in Section III and V, the NRC agrees to refrain from proposing a civil penalty or issuing a Notice of Violation for all matters discussed in the NRC's letter to NFS of January 7, 2009 (EA–08–103).

(11) This agreement is binding upon successors and assigns of NFS.

IV

Since NFS has completed the actions as delineated in Section III.5, and agreed to take the actions as set forth in Section V, the NRC has concluded that its concerns can be resolved through issuance of this Order.

I find that NFS' commitments as set forth in Section V are acceptable and necessary and conclude that with these commitments the public health and safety and common defense and security are reasonably assured. In view of the foregoing, I have determined that public health and safety require that NFS' commitments be confirmed by this Order. Based on the above and NFS' consent, this Order is immediately effective upon issuance.

V

Accordingly, pursuant to Sections 51, 53, 161b, 161i, 161o, 182 and 186 of the Atomic Energy Act of 1954, as amended, and the Commission's regulations in 10 CFR 2.202 and 10 CFR part 70, *It is hereby ordered,* effective immediately, that License No. SNM–124 Is Modified as Follows:

(1) NFS agrees to develop an Executive Review Board (ERB) oversight process to review and consider Behavioral Observation Program (BOP)/FFD issues, allegations, positive FFD tests, disciplinary actions, ECP concerns, and if appropriate direct further action, such as root cause and common cause reviews. The ERB will convene on an as needed basis, but not less than quarterly for a period of one year after issuance of the Confirmatory Order. Thereafter, the ERB will convene at a frequency of no less than once per year. The ERB will also review relevant examples of ECP successes and direct communications to NFS staff, as appropriate.

(2) NFS agrees to implement additional ECP enhancements through review of its ECP brochure and other communications for clarity regarding the ability of staff to bring concerns to the ECP on a 24 hour/7 day basis. In addition, NFS will perform a one-time third party evaluation of its ECP.

(3) NFS will develop BOP/FFD case studies for the purpose of communicating program changes, reporting thresholds for FFD issues, avenues for reporting, and other FFD issues. One such case study will be developed from the circumstances arising from the FFD incident of March 2006 described in the NRC's letter of January 7, 2009. These case studies will be used in FFD training and the presentation will include participation by NFS management at the Level III management level and above.

(4) NFS will revise FFD procedures as necessary to clearly define when self-referred status is no longer available and communicate these revisions to NFS employees.

(5) NFS will revise its process for handling NRC Requests For Information related to allegations to assure the completeness and accuracy of information.

(6) NFS will modify FFD and BOP procedures for referral of issues to the MRO to provide a vehicle for transmitting event information. The modification will also include a provision for employee consent to disclose pertinent personal privacy information.

(7) NFS will establish appropriate written standards for the MRO and other medical specialists, that ensure effective implementation of 10 CFR part 26 requirements. These standards will reflect the requirements of 10 CFR part 26 as well as the development of commercial, licensing, and regulatory requirements and expectations, continuing education requirements (such as industry peer group membership and certification), and an NFS-specific lesson plan. The MRO's performance to these standards will be assessed by an independent party within one year after issuance of this Confirmatory Order, and every other year thereafter. This assessment will include FFD and BOP referrals, and a review of annual NFS performance audits.

(8) NFS agrees to complete the items listed in Section V above within 12 months of issuance of the Confirmatory Order.

(9) Within three months of completion of the terms of the Confirmatory Order, NFS will provide the NRC a letter discussing its basis for concluding that the Confirmatory Order has been satisfied.

The Regional Administrator, NRC Region II, may relax or rescind, in writing, any of the above conditions upon a showing by NFS of good cause.

VI

Any person adversely affected by this Confirmatory Order, other than NFS, may request a hearing within 20 days of its publication in the **Federal Register**. Where good cause is shown, consideration will be given to extending the time to request a hearing. A request for extension of time must be directed to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and include a statement of good cause for the extension.

If a person other than NFS requests a hearing, that person shall set forth with particularity the manner in which his interest is adversely affected by this Order and shall address the criteria set forth in 10 CFR 2.309(d) and (f).

If a hearing is requested by a person whose interest is adversely affected, the Commission will issue an Order designating the time and place of any hearing. If a hearing is held, the issue to be considered at such hearing shall be whether this Confirmatory Order should be sustained.

All documents filed in NRC adjudicatory proceedings, including a request for hearing, a petition for leave to intervene, any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene, and documents filed by interested governmental entities participating under 10 CFR 2.315(c), must be filed in accordance with the NRC E-Filing rule, (72 FR 49139, Aug. 28, 2007). The E-Filing process requires participants to submit and serve all adjudicatory documents over the Internet, or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek an exemption in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least ten (10) days prior to the filing deadline, the participant should contact the Office of the Secretary by e-mail at *hearing.docket@nrc.gov,* or by telephone at (301) 415–1677, to request (1) a digital ID certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a request or petition for hearing (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the hearing in this proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals/apply-certificates.html.* System requirements for accessing the E-Submittal server are detailed in NRC's ''Guidance for Electronic Submission,'' which is available on the agency's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* Participants may attempt to use other software not listed on the Web site, but should note that the NRC's E-Filing system does not support unlisted software, and the NRC Help Desk will not be able to offer assistance in using unlisted software.

If a participant is electronically submitting a document to the NRC in accordance with the E-Filing rule, the participant must file the document using the NRC's online, Web-based submission form. In order to serve documents through EIE, users will be required to install a Web browser plug-in from the NRC Web site. Further information on the Web-based submission form, including the installation of the Web browser plug-in, is available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.*

Once a participant has obtained a digital ID certificate and a docket has been created, the participant can then submit a request for hearing or petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with NRC guidance available on the NRC public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* A filing is considered complete at the time the documents are submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an e-mail notice confirming receipt of the document. The E-Filing system also distributes an e-mail notice that provides access to the document to the NRC Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID

certificate before a hearing request/petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically using the agency's adjudicatory E-Filing system may seek assistance by contacting the NRC Meta-System Help Desk through the ''Contact Us'' link located on the NRC Web site at *http://www.nrc.gov/site-help/e-submittals.html*, by e-mail at *MSHD.Resource@nrc.gov,* or by a toll-free call at (866) 672–7640. The NRC Meta-System Help Desk is available between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday, excluding government holidays.

Participants who believe that they have a good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville, Pike, Rockville, Maryland 20852, Attention: Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service. A presiding officer, having granted an exemption request from using E-Filing, may require a participant or party to use E-Filing if the presiding officer subsequently determines that the reason for granting the exemption from use of E-Filing no longer exists.

Documents submitted in adjudicatory proceedings will appear in NRC's electronic hearing docket which is available to the public at *http://ehd.nrc.gov/EHD_Proceeding/home.asp,* unless excluded pursuant to an order of the Commission, or the presiding officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

VII

In the absence of any request for hearing, or written approval of an extension of time in which to request a hearing, the provisions specified in Section V above shall be final 20 days from the date this Order is published in the **Federal Register** without further order or proceedings. If an extension of time for requesting a hearing has been approved, the provision specified in Section V shall be final when the extension expires if a hearing request has not been received.

A Request for Hearing Shall Not Stay the Immediate Effectiveness of this Order.

Dated this 23rd day of November 2009.

For the Nuclear Regulatory Commission.

Victor M. McCree,

Deputy Regional Administrator for Operations.

[FR Doc. E9–29205 Filed 12–7–09; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 70–3098; NRC–2009–0540; Construction Authorization No. CAMOX–001; EA–09–117]

Shaw AREVA MOX Services, Aiken, SC; Confirmatory Order Modifying Construction Authorization (Effective Immediately)

I

Shaw AREVA MOX Services (MOX Services or Licensee) is the holder of Construction Authorization No. CAMOX–001, issued by the Nuclear Regulatory Commission (NRC or Commission) pursuant to 10 CFR Part 70 on March 30, 2005. The license authorizes the construction of a mixed-oxide fuel fabrication facility in accordance with the conditions specified therein. The facility is located on the Department of Energy's Savannah River Site in Aiken, South Carolina.

This Confirmatory Order is the result of an agreement reached during alternative dispute resolution (ADR) sessions conducted on October 8, 2009.

II

On July 29, 2008, the NRC's Office of Investigations (OI) initiated an investigation to determine whether a former contractor employed as a Senior Structural Engineer (SSE) at the MOX facility deliberately directed or allowed a junior civil structural engineer (CSE) to sign his signature to vendor data review forms without identifying the CSE as the signer. The NRC's letter of July 29, 2009, documented an apparent violation of NRC requirements involving the former Senior Structural Engineer (SSE), who caused MOX Services to be in violation of 10 CFR 70.9, ''Completeness and accuracy of information.'' Specifically, the SSE directed or allowed a junior engineer to sign his signature on travelers, contrary to an Engineering Directive. Travelers are used as part of MOX Services' process to signify that field drawings match design drawings. Thirty-seven travelers were identified in which the signature may not have been provided in accordance with requirements.

III

On October 8, 2009, the NRC and MOX Services met in an ADR session mediated by a professional mediator, which was arranged through Cornell University's Institute on Conflict Resolution. ADR is a process in which a neutral mediator with no decision-making authority assists the parties in reaching an agreement or resolving any differences regarding their dispute. This confirmatory order is issued pursuant to the agreement reached during the ADR process. The elements of the agreement consist of the following:

(1) As of the ADR meeting, the NRC continues to believe that a violation of 10 CFR 70.9 occurred.

(2) MOX Services initially presumed the traveler signatures may have been inaccurate and implemented corrective actions and enhancements, as discussed below, to prevent similar incidents. Based on its internal investigation, MOX Services determined that it had an insufficient basis to conclude that inappropriate signatures were affixed to documents and that a violation occurred.

(3) To prevent similar incidents, preclude future violations, and to address NRC concerns, MOX Services completed the following corrective actions and enhancements:

a. Prompt initiation of a Condition Report, classified at Significance Level B;

b. Prompt review of all affected drawings and travelers to verify changes were properly incorporated into the vendor drawings;

c. Initiation of an investigation into the circumstances of the incident and identification of causal factors;

d. Performance of an extent of condition review to confirm that the

issue was limited to the 37 travelers in question;

e. Review of the document type thought to be most susceptible to a similar cause (no additional examples were identified);

f. Issuance of a formal memorandum to all Engineering personnel to remind them of the requirements of Engineering Directive (ED) 17 regarding delegation of signature authority;

g. Revision to ED–17 to include examples of how to sign a delegated signature and to clearly state that delegation documents should be submitted to Document Control;

h. Issuance of a new Management Policy MD–013 on Delegation of Signatures, which is applicable to all personnel who are assigned to and perform work on the MOX Services Project;

i. The completion of Quality Assurance surveillance QA–09–0173, which reviewed vendor submittals, including drawing submittals, from contractors to assure each was properly identified, submitted, reviewed and approved, and to assure each was consistent with project commitments and the design basis;

j. Performance of training for all MOX Services project personnel, including onsite contractors, on the definition and consequences associated with Material False Statements, and obligations as a signer of pertinent project records;

k. The performance of a Safety Conscious Work Environment Survey in February 2008;

l. Computer Based Training (CBT) on Safety Conscious Work Environment and other related Nuclear Safety Culture initiatives and attributes;

m. Reiteration, via numerous means including an all-hands meeting with the MOX Services President, of avenues for raising safety concerns to all MOX Services Project employees.

(4) MOX Services also agreed to additional corrective actions and enhancements by the end of calendar year 2010, and periodically thereafter at a frequency deemed appropriate by MOX Services, as fully delineated below:

a. MOX Services agrees to perform periodic Quality Assurance (QA) assessments/surveillances of vendor submittals (including drawings) to ensure design requirements are properly implemented in the field through the life of the construction phase;

b. MOX Services agrees to provide periodic CBT training to all MOX Services project personnel, including onsite contractors, on the definition and consequences associated with Material False Statements, and obligations as a signer of pertinent project records; and

c. MOX Services agrees to perform periodic Safety Conscious Work Environment surveys through the life of the construction phase.

(5) The NRC and MOX Services agree that the above elements will be incorporated into a Confirmatory Order. The resulting Confirmatory Order will be considered by the NRC for any future assessment of MOX Services, as appropriate.

(6) MOX Services agrees to complete the items listed in Paragraph III.4 above by the end of calendar year 2010.

(7) Within three months of completion of the terms of the Confirmatory Order (calendar year 2010), MOX Services will provide the NRC with a letter discussing its basis for concluding that the Confirmatory Order has been satisfied.

(8) In consideration of the commitments delineated in Paragraphs III.3 and 4 above, the NRC agrees to refrain from proposing a civil penalty or issuing a Notice of Violation for all matters discussed in the NRC's letter to MOX Services of July 29, 2009 (EA–09–117).

(9) This agreement is binding upon successors and assigns of MOX Services.

On October 20, 2009, MOX Services consented to issuance of this Order with the commitments, as described in Section V below. The Licensee further agreed that this Order is to be effective upon issuance and that it has waived its right to a hearing.

IV

Since MOX Services has completed the actions as delineated in Section III.3, and agreed to take the actions as set forth in Section V, the NRC has concluded that its concerns can be resolved through issuance of this Order.

I find that MOX Services' commitments as set forth in Section V are acceptable and necessary and conclude that with these commitments the public health and safety are reasonably assured. In view of the foregoing, I have determined that public health and safety require that MOX Services' commitments be confirmed by this Order. Based on the above and MOX Services' consent, this Order is immediately effective upon issuance.

V

Accordingly, pursuant to Sections 51, 53, 161b, 161i, 161o, 182 and 186 of the Atomic Energy Act of 1954, as amended, and the Commission's regulations in 10 CFR 2.202 and 10 CFR Part 70, *It is hereby ordered,* effective immediately, that construction authorization no. CAMOX–001 is modified as follows:

(1) MOX Services agrees to perform periodic Quality Assurance (QA) assessments/surveillances of vendor submittals (including drawings) to ensure design requirements are properly implemented in the field through the life of the construction phase.

(2) MOX Services agrees to provide periodic CBT training to all MOX Services project personnel, including onsite contractors, on the definition and consequences associated with Material False Statements, and obligations as a signer of pertinent project records.

(3) MOX Services agrees to perform periodic Safety Conscious Work Environment surveys through the life of the construction phase.

(4) MOX Services agrees to complete the actions identified in Section V above by the end of calendar year 2010.

(5) Within three months of completion of the terms of the Confirmatory Order (calendar year 2010), MOX Services will provide the NRC with a letter discussing its basis for concluding that the Confirmatory Order has been satisfied.

The Regional Administrator, NRC Region II, may relax or rescind, in writing, any of the above conditions upon a showing by MOX Services of good cause.

VI

Any person adversely affected by this Confirmatory Order, other than MOX Services, may request a hearing within 20 days of its publication in the **Federal Register**. Where good cause is shown, consideration will be given to extending the time to request a hearing. A request for extension of time must be directed to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and include a statement of good cause for the extension.

If a person other than MOX Services requests a hearing, that person shall set forth with particularity the manner in which his interest is adversely affected by this Order and shall address the criteria set forth in 10 CFR 2.309 (d) and (f).

If a hearing is requested by a person whose interest is adversely affected, the Commission will issue an Order designating the time and place of any hearing. If a hearing is held, the issue to be considered at such hearing shall be whether this Confirmatory Order should be sustained.

All documents filed in NRC adjudicatory proceedings, including a request for hearing, a petition for leave to intervene, any motion or other

document filed in the proceeding prior to the submission of a request for hearing or petition to intervene, and documents filed by interested governmental entities participating under 10 CFR 2.315(c), must be filed in accordance with the NRC E-Filing rule, (72 FR 49139, Aug. 28, 2007). The E-Filing process requires participants to submit and serve all adjudicatory documents over the internet, or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek an exemption in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least ten (10) days prior to the filing deadline, the participant should contact the Office of the Secretary by e-mail at *hearing.docket@nrc.gov,* or by telephone at (301) 415–1677, to request (1) a digital ID certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a request or petition for hearing (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the hearing in this proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals/apply-certificates.html.* System requirements for accessing the E-Submittal server are detailed in NRC's ''Guidance for Electronic Submission,'' which is available on the agency's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* Participants may attempt to use other software not listed on the Web site, but should note that the NRC's E-Filing system does not support unlisted software, and the NRC Help Desk will not be able to offer assistance in using unlisted software.

If a participant is electronically submitting a document to the NRC in accordance with the E-Filing rule, the participant must file the document using the NRC's on-line, Web-based submission form. In order to serve documents through EIE, users will be required to install a Web browser plug-in from the NRC Web site. Further information on the Web-based submission form, including the installation of the Web browser plug-in, is available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.*

Once a participant has obtained a digital ID certificate and a docket has been created, the participant can then submit a request for hearing or petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with NRC guidance available on the NRC public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* A filing is considered complete at the time the documents are submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an e-mail notice confirming receipt of the document. The E-Filing system also distributes an e-mail notice that provides access to the document to the NRC Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request/petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically using the agency's adjudicatory E-Filing system may seek assistance by contacting the NRC Meta-System Help Desk through the ''Contact Us'' link located on the NRC Web site at *http://www.nrc.gov/site-help/e-submittals.html,* by e-mail at *MSHD.Resource@nrc.gov,* or by a toll-free call at (866) 672–7640. The NRC Meta-System Help Desk is available between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday, excluding government holidays.

Participants who believe that they have a good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852, Attention: Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service. A presiding officer, having granted an exemption request from using E-Filing, may require a participant or party to use E-Filing if the presiding officer subsequently determines that the reason for granting the exemption from use of E-Filing no longer exists.

Documents submitted in adjudicatory proceedings will appear in NRC's electronic hearing docket which is available to the public at *http://ehd.nrc.gov/EHD_Proceeding/home.asp,* unless excluded pursuant to an order of the Commission, or the presiding officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

VII

In the absence of any request for hearing, or written approval of an extension of time in which to request a hearing, the provisions specified in Section V above shall be final 20 days from the date this Order is published in the **Federal Register** without further order or proceedings. If an extension of time for requesting a hearing has been approved, the provisions specified in Section V shall be final when the extension expires if a hearing request has not been received. A request for hearing shall not stay the immediate effectiveness of this order.

Dated this 24th day of November 2009.

For the Nuclear Regulatory Commission.

Luis A. Reyes,

Regional Administrator.

[FR Doc. E9–29196 Filed 12–7–09; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[IA–09–012]

Cedric Fernando, M.D.; Confirmatory Order (Effective Immediately)

I

Cedric Fernando, M.D., is a licensed physician who provides physician services to Nuclear Fuel Services, Inc. (NFS or Licensee) and is the Medical Review Officer for NFS. The Licensee is the holder of Special Nuclear Materials License No. SNM–124 issued by the Nuclear Regulatory Commission (NRC or Commission) pursuant to 10 CFR part 70 on July 2, 1999. The license authorizes the operation of the NFS facility in accordance with the conditions specified therein. The facility is located on the Licensee's site in Erwin, Tennessee.

This Confirmatory Order is the result of an agreement reached during an Alternative Dispute Resolution (ADR) mediation session conducted on May 15, 2009.

II

On October 21, 2008, the NRC's Office of Investigations (OI) initiated a review of an October 2007 incident that occurred at the Licensee's facility in which the hearing test portion of a medical examination was not administered to two security officers. Dr. Cedric Fernando was providing physician services for a contractor to NFS at the time, and was involved in certifying that security officers were medically qualified per medical standards.

Based on the evidence developed during the investigation, the NRC staff identified two apparent violations of 10 CFR 70.10, as summarized below:

(1) On October 19, 2007, Dr. Fernando signed two Security Medical Examination forms certifying that the named security officers were medically qualified per medical standards when, in fact, the security officers had not been administered the hearing test portion of the medical examination.

(2) Dr. Fernando submitted to the NFS security office the signed but incomplete Security Medical Examination forms indicating that the two security officers were medically qualified per medical standards when, in fact, the security officers had not been administered the hearing test portion of the medical examination.

III

On May 15, 2009, the NRC and Dr. Fernando met in an ADR session mediated by a professional mediator, which was arranged through Cornell University's Institute on Conflict Resolution. ADR is a process in which a neutral mediator with no decision-making authority assists the parties in reaching an agreement or resolving any differences regarding their dispute. This confirmatory order is issued pursuant to the agreement reached during the ADR process. The elements of the agreement consist of the following:

(1) Dr. Fernando admits that he signed the two incomplete Security Medical Examination forms and allowed them to be submitted to NFS's security office. He stated that he made a mistake in signing the forms, and denies that he engaged in any deliberate misconduct. On the day in question, the hearing test technician was unexpectedly absent and no backup was available. Dr. Fernando completed the remaining portions of the physical exams, including an examination of their ears. Dr. Fernando stated that, at the time of the physical exam, he had no reason to believe that either individual had any hearing problems. Dr. Fernando signed the forms and instructed his assistant to notify the NFS security office that the individuals needed to return to complete the tests. Dr. Fernando's assistant repeatedly attempted to reschedule the tests, but was unsuccessful. In February 2008, upon discovering that the hearing tests had not been performed, Dr. Fernando instructed his assistant to immediately schedule the hearing tests. The hearing tests were completed on or about the next day, and both individuals had impeccable hearing.

(2) At the ADR session, Dr. Fernando expressed and re-emphasized his commitment and willingness to comply with all NRC regulations, including providing complete and accurate information. To this end, Dr. Fernando agrees and is committed to the actions set forth in Section V below:

(3) In consideration of Dr. Fernando's commitments as set forth in Section V, NRC agrees not to pursue action with respect to Dr. Fernando for those matters referred to in Section II above, with the exception of the NRC's confirmation of completion of the actions discussed in the Confirmatory Order.

(4) Dr. Fernando agrees that the elements discussed in Section V will be incorporated into a Confirmatory Order, and agrees to waive the right to request a hearing regarding all or any part of this Confirmatory Order.

IV

Since Dr. Fernando agreed to take the actions as set forth in Section V, the NRC has concluded its concerns can be resolved through issuance of this Order.

I find that Dr. Fernando's commitments as set forth in Section V are acceptable and necessary and conclude that with these commitments the public health and safety and common defense and security are reasonably assured. In view of the foregoing, I have determined that public health and safety require that Dr. Fernando's commitments be confirmed by this Order. Based on the above and Dr. Fernando's consent, this Order is immediately effective upon issuance.

V

Accordingly, pursuant to Sections 51, 53, 161b, 161i, 161o, 182 and 186 of the Atomic Energy Act of 1954, as amended, and the Commission's regulations in 10 CFR 2.202 and 10 CFR part 70, *It is hereby ordered*, effective immediately, that:

(1) Dr. Fernando will ensure that an independent assessment (such as an NFS ''Tap Root'' investigation) is conducted into the circumstances that led to the incident, to identify root and contributing causes. The NRC acknowledges corrective actions and enhancements completed by Dr. Fernando regarding the training of staff and the development of a process to ensure that all medical-related testing and examinations would be completed prior to the authorizing signatures of a Certified Medical Assistant and the attending Physician.

(2) Based on the above assessment, Dr. Fernando will develop lessons learned, and if indicated, implement additional corrective actions from the assessment.

(3) Dr. Fernando and a physician engaged in NRC-regulated activities will meet at least quarterly to review unique or noteworthy issues relevant to compliance with NRC regulations. In addition, Dr. Fernando will initiate a one time, mutual review of processes and procedures with his Babcock and Wilcox Nuclear Owners Group (B&W NOG) counterpart.

(4) Dr. Fernando will take a course certified for continuing medical education credit that addresses best practices for administrative office procedures and record keeping.

(5) Dr. Fernando will communicate lessons learned and experiences as a result of this incident to an appropriate audience (e.g., industry peers, NFS Safety Culture Oversight Group).

(6) Dr. Fernando agrees that actions listed in Section V.1–5 above will begin

within 30 days of the NRC's issuance of the Confirmatory Order, and will be completed no later than one year from the NRC's issuance of a Confirmatory Order.

(7) Upon completion of all of the actions identified in Section V.1–6 above, Dr. Fernando will submit a letter within 30 days to the NRC advising of their completion. The letter will include details so as to allow the NRC to confirm completion of such activities.

The Regional Administrator, NRC Region II, may relax or rescind, in writing, any of the above conditions upon a showing by Dr. Fernando of good cause.

VI

Any person adversely affected by this Confirmatory Order, other than Dr. Fernando, may request a hearing within 20 days of its publication in the **Federal Register**. Where good cause is shown, consideration will be given to extending the time to request a hearing. A request for extension of time must be directed to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and include a statement of good cause for the extension.

If a person other than Dr. Fernando requests a hearing, that person shall set forth with particularity the manner in which his interest is adversely affected by this Order and shall address the criteria set forth in 10 CFR 2.309(d) and (f).

If a hearing is requested by a person whose interest is adversely affected, the Commission will issue an Order designating the time and place of any hearing. If a hearing is held, the issue to be considered at such hearing shall be whether this Confirmatory Order should be sustained.

All documents filed in NRC adjudicatory proceedings, including a request for hearing, a petition for leave to intervene, any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene, and documents filed by interested governmental entities participating under 10 CFR 2.315(c), must be filed in accordance with the NRC E-Filing rule, (72 FR 49139, Aug. 28, 2007). The E-Filing process requires participants to submit and serve all adjudicatory documents over the Internet, or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek an exemption in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least ten (10) days prior to the filing deadline, the participant should contact the Office of the Secretary by e-mail at *hearing.docket@nrc.gov*, or by telephone at (301) 415–1677, to request (1) a digital ID certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a request or petition for hearing (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the hearing in this proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals/apply-certificates.html*. System requirements for accessing the E-Submittal server are detailed in NRC's ''Guidance for Electronic Submission,'' which is available on the agency's public Web site at *http://www.nrc.gov/site-help/e-submittals.html*. Participants may attempt to use other software not listed on the Web site, but should note that the NRC's E-Filing system does not support unlisted software, and the NRC Help Desk will not be able to offer assistance in using unlisted software.

If a participant is electronically submitting a document to the NRC in accordance with the E-Filing rule, the participant must file the document using the NRC's on-line, Web-based submission form. In order to serve documents through EIE, users will be required to install a Web browser plug-in from the NRC Web site. Further information on the Web-based submission form, including the installation of the Web browser plug-in, is available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals.html*.

Once a participant has obtained a digital ID certificate and a docket has been created, the participant can then submit a request for hearing or petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with NRC guidance available on the NRC public Web site at *http://www.nrc.gov/site-help/e-submittals.html*. A filing is considered complete at the time the documents are submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an e-mail notice confirming receipt of the document. The E-Filing system also distributes an e-mail notice that provides access to the document to the NRC Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request/petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically using the agency's adjudicatory E-Filing system may seek assistance by contacting the NRC Meta-System Help Desk through the ''Contact Us'' link located on the NRC Web site at *http://www.nrc.gov/site-help/e-submittals.html*, by e-mail at *MSHD.Resource@nrc.gov*, or by a toll-free call at (866) 672–7640. The NRC Meta-System Help Desk is available between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday, excluding government holidays.

Participants who believe that they have a good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852, Attention: Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service. A presiding officer, having granted an exemption request from using E-Filing, may require a participant or party to use E-Filing if the presiding

officer subsequently determines that the reason for granting the exemption from use of E-Filing no longer exists.

Documents submitted in adjudicatory proceedings will appear in NRC's electronic hearing docket which is available to the public at *http://ehd.nrc.gov/EHD_Proceeding/home.asp*, unless excluded pursuant to an order of the Commission, or the presiding officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

VII

In the absence of any request for hearing, or written approval of an extension of time in which to request a hearing, the provisions specified in Section V above shall be final 20 days from the date this Order is published in the **Federal Register** without further order or proceedings. If an extension of time for requesting a hearing has been approved, the provisions specified in Section V shall be final when the extension expires if a hearing request has not been received. A request for hearing shall not stay the immediate effectiveness of this order.

Dated this 23rd day of November 2009.

For the Nuclear Regulatory Commission.

Victor M. McCree,

Deputy Regional Administrator for Operations.

[FR Doc. E9–29201 Filed 12–7–09; 8:45 am]

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NUCLEAR REGULATORY COMMISSION

[NRC–2009–0526; IA–08–036]

In the Matter of Cedric Fernando, M.D.; Confirmatory Order (Effective Immediately)

I

Cedric Fernando, M.D., is a licensed physician who provides physician services to Nuclear Fuel Services, Inc. (NFS or Licensee) and is the Medical Review Officer (MRO) for NFS. The Licensee is the holder of Special Nuclear Materials License No. SNM–124 issued by the Nuclear Regulatory Commission (NRC or Commission) pursuant to 10 CFR Part 70 on July 2, 1999. The license authorizes the operation of the NFS facility in accordance with the conditions specified therein. The facility is located on the Licensee's site in Erwin, Tennessee.

This Confirmatory Order is the result of an agreement reached during an Alternative Dispute Resolution (ADR) mediation session conducted on May 14, 2009.

II

An incident occurred at the Licensee's facility in March 2006, in which an NFS senior executive violated the NFS Fitness-For-Duty (FFD) policy and regulatory requirements. As the Medical Review Officer for NFS at the time, Dr. Cedric Fernando reviewed the circumstances of the FFD incident and was involved in a subsequent determination as to whether the former NFS senior executive was fit to return to duty.

On April 20, 2006, the NRC's Office of Investigations (OI) initiated a review of the March 2006 FFD incident. Based on the evidence developed during the investigation, the NRC staff identified three apparent violations of 10 CFR 70.10, as summarized below:

(1) On April 5, 2006, Dr. Fernando provided materially incomplete information to a contract professional retained by NFS to perform a determination of fitness for duty of the NFS senior executive.

(2) Dr. Fernando's failure to provide the contract professional this material information caused NFS to fail to make an informed determination that the NFS senior executive was fit to safely and competently perform his duties and responsibilities before being returned to duty.

(3) On or about April 5, 2006, Dr. Fernando provided materially inaccurate information to NFS that the NFS senior executive had entered a substance abuse rehabilitation program, when in fact he had not done so.

Dr. Fernando disagrees that any of the identified apparent violations occurred.

III

On May 14, 2009, the NRC and Dr. Fernando met in an ADR session mediated by a professional mediator, which was arranged through Cornell University's Institute on Conflict Resolution. ADR is a process in which a neutral mediator with no decision-making authority assists the parties in reaching an agreement or resolving any differences regarding their dispute. This confirmatory order is issued pursuant to the agreement reached during the ADR process. The elements of the agreement consist of the following:

(1) Dr. Fernando disagrees with the facts on which the Agency based its preliminary conclusion that he violated 10 CFR 70.10 and denies any misconduct. At the ADR meeting, Dr. Fernando elaborated on the circumstances concerning his involvement in the referral of the NFS senior executive. Dr. Fernando emphasized that his actions at the time were consistent with the roles and responsibilities of an MRO providing services to an NRC licensee, his current work processes and practices, and were consistent with general medical practice. Dr. Fernando stated that his actions did not violate any NRC requirements, circumvent a thorough assessment of the NFS senior executive's fitness to return to duty because the contract professional had the information that he allegedly failed to provide, or mislead NFS regarding the treatment that the NFS senior executive received.

(2) At the ADR session, Dr. Fernando expressed and re-emphasized his commitment and willingness to comply with all NRC regulations. To this end, Dr. Fernando agrees and is committed to the actions set forth in Section V below.

(3) In consideration of the above, NRC agrees not to pursue action with respect to Dr. Fernando for those matters referred to in Section II above, with the exception of NRC's confirmation of completion of the actions discussed in the Confirmatory Order.

(4) Dr. Fernando agrees that the elements discussed in Section V will be incorporated into a Confirmatory Order, and agrees to waive the right to request a hearing regarding all or any part of this Confirmatory Order.

IV

Since Dr. Fernando agrees to take the actions as set forth in Section V, the NRC has concluded that its concerns can be resolved through issuance of this Order.

I find that Dr. Fernando's commitments as set forth in Section V are acceptable and necessary and conclude that with these commitments the public health and safety and common defense and security are reasonably assured. In view of the foregoing, I have determined that public health and safety require that Dr. Fernando's commitments be confirmed by this Order. Based on the above and Dr. Fernando's consent, this Order is immediately effective upon issuance.

V

Accordingly, pursuant to Sections 51, 53, 161b, 161i, 161o, 182 and 186 of the Atomic Energy Act of 1954, as amended, and the Commission's regulations in 10 CFR 2.202 and 10 CFR Part 70, *it is hereby ordered*, effective immediately, that:

(1) Dr. Fernando will ensure that an independent assessment is conducted by a certified MRO (currently practicing MRO responsibilities in accordance with the most recent amendment to 10 CFR Part 26), as to the circumstances attending to the referral of the NFS senior executive. Such assessment will consider regulatory and professional directives and industry ''best practices'' standards.

(2) Based on the above assessment, Dr. Fernando will develop lessons learned, and if indicated, implement corrective actions from the assessment.

(3) Dr. Fernando and an MRO engaged in NRC-regulated activities will meet at least quarterly to review unique or noteworthy issues relevant to compliance with NRC regulations. In addition, Dr. Fernando will initiate a one time, mutual review of MRO processes and procedures with his Babcock and Wilcox Nuclear Owners Group (B&W NOG) counterpart.

(4) Dr. Fernando will attend the American Association of Medical Review Officers (AAMRO) Drug Testing Symposium. NRC acknowledges that in February 2009, Dr. Fernando was recertified as an MRO by AAMRO. In March 2009, Dr. Fernando attended the Comprehensive Medical Review Officer Training provided by the AAMRO.

(5) Dr. Fernando will submit a letter to a nationally recognized MRO certification program to request advice on how best to solicit information from the MRO community on the MRO referral process. Dr. Fernando agrees to take all reasonable efforts to carry out the measures suggested by the nationally recognized MRO certification program.

(6) Dr. Fernando agrees that actions listed in Section V.1–5 above will begin within 30 days of the date of NRC's issuance of this Confirmatory Order, and will be completed no later than one year from the date of issuance of the Confirmatory Order.

(7) Upon completion of all of the actions identified in Section V.1–6 above, Dr. Fernando will submit a letter within 30 days to the NRC attesting to their completion. The letter will include details so as to allow the NRC to confirm completion of such activities.

The Regional Administrator, NRC Region II, may relax or rescind, in writing, any of the above conditions upon a showing by Dr. Fernando of good cause.

VI

Any person adversely affected by this Confirmatory Order, other than Dr. Fernando, may request a hearing within 20 days of its publication in the **Federal Register**. Where good cause is shown, consideration will be given to extending the time to request a hearing. A request for extension of time must be directed to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and include a statement of good cause for the extension.

If a person other than Dr. Fernando requests a hearing, that person shall set forth with particularity the manner in which his interest is adversely affected by this Order and shall address the criteria set forth in 10 CFR 2.309(d) and (f).

If a hearing is requested by a person whose interest is adversely affected, the Commission will issue an Order designating the time and place of any hearing. If a hearing is held, the issue to be considered at such hearing shall be whether this Confirmatory Order should be sustained.

All documents filed in NRC adjudicatory proceedings, including a request for hearing, a petition for leave to intervene, any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene, and documents filed by interested governmental entities participating under 10 CFR 2.315(c), must be filed in accordance with the NRC E-Filing rule, (72 FR 49139, Aug. 28, 2007). The E-Filing process requires participants to submit and serve all adjudicatory documents over the internet, or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek an exemption in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least ten (10) days prior to the filing deadline, the participant should contact the Office of the Secretary by e-mail at *hearing.docket@nrc.gov*, or by telephone at (301) 415–1677, to request (1) a digital ID certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a request or petition for hearing (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the hearing in this proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals/apply-certificates.html*. System requirements for accessing the E-Submittal server are detailed in NRC's ''Guidance for Electronic Submission,'' which is available on the agency's public Web site at *http://www.nrc.gov/site-help/e-submittals.html*. Participants may attempt to use other software not listed on the Web site, but should note that the NRC's E-Filing system does not support unlisted software, and the NRC Help Desk will not be able to offer assistance in using unlisted software.

If a participant is electronically submitting a document to the NRC in accordance with the E-Filing rule, the participant must file the document using the NRC's on-line, Web-based submission form. In order to serve documents through EIE, users will be required to install a Web browser plug-in from the NRC Web site. Further information on the Web-based submission form, including the installation of the Web browser plug-in, is available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals.html*.

Once a participant has obtained a digital ID certificate and a docket has been created, the participant can then submit a request for hearing or petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with NRC guidance available on the NRC public Web site at *http://www.nrc.gov/site-help/e-submittals.html*. A filing is considered complete at the time the documents are submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an e-mail notice confirming receipt of the document. The E-Filing system also distributes an e-mail notice that provides access to the document to the NRC Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those

participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request/petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically using the agency's adjudicatory E-Filing system may seek assistance by contacting the NRC Meta-System Help Desk through the ''Contact Us'' link located on the NRC Web site at *http://www.nrc.gov/site-help/e-submittals.html*, by e-mail at *MSHD.Resource@nrc.gov*, or by a toll-free call at (866) 672–7640. The NRC Meta-System Help Desk is available between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday, excluding government holidays.

Participants who believe that they have a good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852, Attention: Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service. A presiding officer, having granted an exemption request from using E-Filing, may require a participant or party to use E-Filing if the presiding officer subsequently determines that the reason for granting the exemption from use of E-Filing no longer exists.

Documents submitted in adjudicatory proceedings will appear in NRC's electronic hearing docket which is available to the public at *http://ehd.nrc.gov/EHD_Proceeding/home.asp*, unless excluded pursuant to an order of the Commission, or the presiding officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

VII

In the absence of any request for hearing, or written approval of an extension of time in which to request a hearing, the provisions specified in Section V above shall be final 20 days from the date this Order is published in the **Federal Register** without further order or proceedings. If an extension of time for requesting a hearing has been approved, the provisions specified in Section V shall be final when the extension expires if a hearing request has not been received. A request for hearing shall not stay the immediate effectiveness of this order.

Dated this 23rd day of November 2009.

For the Nuclear Regulatory Commission.

Victor M. McCree,

Deputy Regional Administrator for Operations.

[FR Doc. E9–29200 Filed 12–7–09; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 70–143; License No. SNM–124; EA–08–321; NRC–2009–0528]

In the Matter of Nuclear Fuel Services, Inc., Erwin, TN; Confirmatory Order Modifying License (Effective Immediately)

I

Nuclear Fuel Services, Inc. (NFS or Licensee) is the holder of Special Nuclear Materials License No. SNM–124 issued by the Nuclear Regulatory Commission (NRC or Commission) pursuant to 10 CFR Part 70 on July 2, 1999. The license authorizes the operation of the NFS facility in accordance with the conditions specified therein. The facility is located on the Licensee's site in Erwin, Tennessee.

This Confirmatory Order is the result of an agreement reached during an Alternative Dispute Resolution (ADR) session conducted on September 16, 2009.

II

On October 21, 2008, the NRC's Office of Investigations (OI) initiated a review of an October 2007 incident that occurred at the Licensee's facility in which the hearing test portion of a medical examination was not administered to two security officers. The NRC's letter of February 26, 2009, documented two apparent violations of NRC requirements. The apparent violations involved the actions of a primary physician for licensed activities for Nuclear Fuel Services, Inc., who on October 19, 2007, certified on two security medical examination forms that the named security officers were medically qualified per medical standards when in fact their medical evaluation had not been completed. Specifically, the two security officers had not been administered the hearing test portion of the medical examination. As a result, Nuclear Fuel Services, Inc., maintained incomplete and inaccurate information, in violation of 10 CFR 70.9(a). Additionally, the security officers were assigned to perform security duties without proper suitability certification between October 23, 2007, and February 9, 2008, in violation of 10 CFR 73.46(b)(4).

III

On September 16, 2009, the NRC and NFS met in an ADR session mediated by a professional mediator, which was arranged through Cornell University's Institute on Conflict Resolution. ADR is a process in which a neutral mediator with no decision-making authority assists the parties in reaching an agreement or resolving any differences regarding their dispute. This confirmatory order is issued pursuant to the agreement reached during the ADR process. The elements of the agreement consist of the following:

(1) NFS agrees that the two issues discussed in the NRC's letter of February 26, 2009, represent violations of regulatory requirements.

(2) To preclude recurrence of the violations and to address NRC concerns, NFS completed the following corrective actions and enhancements:

a. On February 5, 2008, both security officers were removed from security duties and scheduled for hearing tests. The security officers passed the test.

b. On February 5, 2008, a Security Training Specialist performed a query on physical examinations completed during the same time frame (October 15–26, 2007) and reviewed physical exam paperwork for additional discrepancies. No additional discrepancies were identified.

c. On February 6, 2008, the Security Training Manager met with the Contract Security Scheduler and the Security Training Specialists to reinforce the importance of physical exam

requirements and provided instructions on performing a proper review of physical exams and immediate actions to take for identified discrepancies.

d. On February 6, 2008, the Security Training Manager met with the primary physician for licensed activities and reinforced the importance of physical exam requirements regarding the Site Training and Qualification Plan.

e. On February 6, 2008, NFS received physical exam paperwork documenting the successful completion of hearing tests for the two security officers and allowed officers to resume security duties.

f. NFS created procedure NFS–SEC–008 in March 2009 to educate the security work force on basic physical qualification requirements.

g. NFS has instituted an administrative check process to ensure that all required information is annotated on the incoming physical exam forms.

(3) In addition to the actions completed by NFS as discussed above, NFS agreed to additional corrective actions and enhancements, as fully delineated below in Section V of the Confirmatory Order.

(4) The NRC and NFS agree that the elements discussed in Sections III and V will be incorporated into a Confirmatory Order. The resulting Confirmatory Order will be considered by the NRC for any future assessment of NFS, as appropriate.

(5) NFS agrees to complete the items listed in Section V within 12 months of issuance of the Confirmatory Order.

(6) Within three months of completion of the terms of the Confirmatory Order, NFS will provide the NRC with a letter discussing its basis for concluding that the Confirmatory Order has been satisfied.

(7) In consideration of the commitments delineated in Section III and V, the NRC agrees to refrain from proposing a civil penalty or issuing a Notice of Violation for all matters discussed in the NRC's letter to NFS of February 26, 2009 (EA–08–321).

(8) This agreement is binding upon successors and assigns of NFS.

IV

Since NFS has completed the actions as delineated in Section III.2, and agreed to take the actions as set forth in Section V, the NRC has concluded that its concerns can be resolved through issuance of this Order.

I find that NFS's commitments as set forth in Section V are acceptable and necessary and conclude that with these commitments the public health and safety and common defense and security are reasonably assured. In view of the foregoing, I have determined that public health and safety require that NFS's commitments be confirmed by this Order. Based on the above and NFS's consent, this Order is immediately effective upon issuance.

V

Accordingly, pursuant to Sections 51, 53, 161b, 161i, 161o, 182 and 186 of the Atomic Energy Act of 1954, as amended, and the Commission's regulations in 10 CFR 2.202 and 10 CFR Part 70, *it is hereby ordered,* effective immediately, that License No. SNM–124 is modified as follows:

(1) NRC acknowledged NFS' ongoing efforts in implementation of the Safety Culture Improvement Plan (SCIP) as prescribed in the NRC's Confirmatory Order of February 21, 2007, and its benchmarking efforts and Corrective Action Program (CAP) improvements. However, NFS also agrees to assess why the incident referenced in Section II was not entered into its CAP and why a formal root cause evaluation was not completed. Based on this review, NFS will implement corrective actions to ensure that the CAP thresholds for conducting root cause evaluations are appropriate. As part of the above assessment, NFS agrees to additional benchmarking efforts, as warranted, to identify and implement best practices, including the area of root cause analysis, thresholds, and processes.

(2) NFS agrees to initiate and complete actions to ensure an understanding of the extent of condition (including vulnerability of other physician certified processes such as respirator qualification).

(3) NFS agrees to benchmark other licensees in their oversight of services provided by any primary physician for licensed activities, to identify and implement best practices and enhancements to ensure the quality and accuracy of licensed physician services.

(4) For a period of one year after issuance of the Confirmatory Order, NFS will ensure that the primary physician responsible for licensed activities meets at least quarterly with a physician engaged in NRC-regulated activities, to review unique or noteworthy issues relevant to compliance with NRC regulations. At the conclusion of the one-year period, NFS will determine the appropriate frequency for continuing such interactions.

(5) NFS will ensure that the primary physician for licensed activities initiates a one time, mutual review of processes and procedures with an industry counterpart involved with applicable NRC-regulated activities. The results of this review will be documented and made available for NRC review. NFS will consider corrective actions and enhancements based on the review.

(6) NFS will establish appropriate standards for the primary physician for licensed activities and other contract medical specialists. These standards will include applicable regulatory requirements, continuing education requirements (such as industry peer group membership and certification), and an NFS specific lesson plan.

(7) NFS will formalize its administrative check used to ensure all required information is annotated on the incoming physical exam forms by revising procedure NFS–SEC–008.

(8) NFS agrees to complete the items listed in Section V within 12 months of issuance of the Confirmatory Order.

(9) Within three months of completion of the terms of the Confirmatory Order, NFS will provide the NRC with a letter discussing its basis for concluding that the Confirmatory Order has been satisfied.

The Regional Administrator, NRC Region II, may relax or rescind, in writing, any of the above conditions upon a showing by NFS of good cause.

VI

Any person adversely affected by this Confirmatory Order, other than NFS, may request a hearing within 20 days of its publication in the **Federal Register**. Where good cause is shown, consideration will be given to extending the time to request a hearing. A request for extension of time must be directed to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and include a statement of good cause for the extension.

If a person other than NFS requests a hearing, that person shall set forth with particularity the manner in which his interest is adversely affected by this Order and shall address the criteria set forth in 10 CFR 2.309(d) and (f).

If a hearing is requested by a person whose interest is adversely affected, the Commission will issue an Order designating the time and place of any hearing. If a hearing is held, the issue to be considered at such hearing shall be whether this Confirmatory Order should be sustained.

All documents filed in NRC adjudicatory proceedings, including a request for hearing, a petition for leave to intervene, any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene, and documents filed by interested

governmental entities participating under 10 CFR 2.315(c), must be filed in accordance with the NRC E-Filing rule, (72 FR 49139, Aug. 28, 2007). The E-Filing process requires participants to submit and serve all adjudicatory documents over the internet, or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek an exemption in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least ten (10) days prior to the filing deadline, the participant should contact the Office of the Secretary by e-mail at *hearing.docket@nrc.gov,* or by telephone at (301) 415–1677, to request (1) a digital ID certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a request or petition for hearing (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the hearing in this proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals/apply-certificates.html.* System requirements for accessing the E-Submittal server are detailed in NRC's ''Guidance for Electronic Submission,'' which is available on the agency's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* Participants may attempt to use other software not listed on the Web site, but should note that the NRC's E-Filing system does not support unlisted software, and the NRC Help Desk will not be able to offer assistance in using unlisted software.

If a participant is electronically submitting a document to the NRC in accordance with the E-Filing rule, the participant must file the document using the NRC's on-line, web-based submission form. In order to serve documents through EIE, users will be required to install a Web browser plug-in from the NRC Web site. Further information on the web-based submission form, including the installation of the Web browser plug-in, is available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.*

Once a participant has obtained a digital ID certificate and a docket has been created, the participant can then submit a request for hearing or petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with NRC guidance available on the NRC public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* A filing is considered complete at the time the documents are submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an e-mail notice confirming receipt of the document. The E-Filing system also distributes an e-mail notice that provides access to the document to the NRC Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request/petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically using the agency's adjudicatory E-Filing system may seek assistance by contacting the NRC Meta-System Help Desk through the ''Contact Us'' link located on the NRC Web site at *http://www.nrc.gov/site-help/e-submittals.html,* by e-mail at *MSHD.Resource@nrc.gov,* or by a toll-free call at (866) 672–7640. The NRC Meta-System Help Desk is available between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday, excluding government holidays.

Participants who believe that they have a good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852, Attention: Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service. A presiding officer, having granted an exemption request from using E-Filing, may require a participant or party to use E-Filing if the presiding officer subsequently determines that the reason for granting the exemption from use of E-Filing no longer exists.

Documents submitted in adjudicatory proceedings will appear in NRC's electronic hearing docket which is available to the public at *http://ehd.nrc.gov/EHD_Proceeding/home.asp,* unless excluded pursuant to an order of the Commission, or the presiding officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

VII

In the absence of any request for hearing, or written approval of an extension of time in which to request a hearing, the provisions specified in Section V above shall be final 20 days from the date this Order is published in the **Federal Register** without further order or proceedings. If an extension of time for requesting a hearing has been approved, the provisions specified in Section V shall be final when the extension expires if a hearing request has not been received. A request for hearing shall not stay the immediate effectiveness of this order.

Dated this 23rd day of November 2009.

For the Nuclear Regulatory Commission.

Victor M. McCree,

Deputy Regional Administrator for Operations.

[FR Doc. E9–29199 Filed 12–7–09; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2009–0537; Docket Nos. 50–269, 50–270, and 50–287]

Duke Energy Carolinas, LLC; Oconee Nuclear Station Units 1, 2, and 3; Environmental Assessment and Finding of No Significant Impact

The U.S. Nuclear Regulatory Commission (NRC) is considering issuance of amendments to Facility Operating License Nos. DPR–38, DPR–47, and DPR–55, issued to Duke Energy Carolinas, LLC (the licensee), for operation of the Oconee Nuclear Station Units 1, 2, and 3, located in Oconee County, South Carolina, in accordance with Title 10 of the Code of Federal Regulations (10 CFR), Section 50.90. Therefore, as required by 10 CFR 51.21, the NRC performed an environmental assessment. Based on the results of the environmental assessment, the NRC is issuing a finding of no significant impact.

Environmental Assessment

Identification of the Proposed Action

The proposed action would approve changes to the Technical Specifications (TSs) and approve changes to the licensee's updated Final Safety Analysis Report (UFSAR) associated with the acceptance of the new reactor protective system and engineered safeguard protective system (RPS/ESPS) digital upgrade.

The proposed action is in accordance with the licensee's application dated January 31, 2008, as supplemented by letters dated, April 3, 2008, April 29, 2008, May 15, 2008, May 28, 2008, September 30, 2008, October 7, 2008, October 16, 2008, October 23, 2008, October 28, 2008, November 6, 2008, November 19, 2008, November 25, 2008, December 22, 2008, February 27, 2009, March 6, 2009, April 3, 2009 (2 separate letters), April 30, 2009, June 19, 2009, and August 10, 2009.

The Need for the Proposed Action

The proposed action is needed to allow the licensee to replace the existing RPS/ESPS with a new digital RPS/ESPS. The licensee is replacing the existing RPS/ESPS because acquiring replacement parts has become very difficult.

Environmental Impacts of the Proposed Action

The NRC has completed its evaluation of the proposed action and concludes that the licensee may make changes to the TSs and update the UFSAR to allow the removal to the existing RPS/ESPS and replace it with a new digital RPS/ESPS.

The details of the staff's safety evaluation will be provided in the license amendments that will be issued as part of the letter to the licensee approving the license amendments.

The proposed action will not significantly increase the probability or consequences of accidents. No changes are being made in the types of effluents that may be released offsite. There is no significant increase in the amount of any effluent released offsite. There is no significant increase in occupational or public radiation exposure. Therefore, there are no significant radiological environmental impacts associated with the proposed action.

With regard to potential non-radiological impacts, the proposed action does not have any foreseeable impacts to land, air, or water resources, including impacts to biota. In addition, there are also no known socioeconomic, cultural, or environmental justice impacts associated with such proposed action. Therefore, there are no significant non-radiological environmental impacts associated with the proposed action.

Accordingly, the NRC concludes that there are no significant environmental impacts associated with the proposed action.

Environmental Impacts of the Alternatives to the Proposed Action

As an alternative to the proposed action, the staff considered denial of the proposed action. Denial of the application would result in no change in current environmental impacts. The environmental impacts of the proposed action and the alternative action are similar.

Alternative Use of Resources

The action does not involve the use of any different resources than those previously considered in the Final Environmental Statement for the Oconee Nuclear Station, Units 1, 2, and 3, and the Final Supplemental Environmental Impact Statement (NUREG–1437 Supplement 2) dated December 1999.

Agencies and Persons Consulted

In accordance with its stated policy, on November 6, 2009, the staff consulted with the South Carolina State official, Mr. Robert M. Gandy, of the South Carolina Department of Health and Environmental Control, regarding the environmental impact of the proposed action. The State official had no comments.

Finding of No Significant Impact

On the basis of the environmental assessment, the NRC concludes that the proposed action will not have a significant effect on the quality of the human environment. Accordingly, the NRC has determined not to prepare an environmental impact statement for the proposed action.

For further details with respect to the proposed action, see the licensee's letter January 31, 2008, as supplemented by letters dated April 3, 2008, April 29, 2008, May 15, 2008, May 28, 2008, September 30, 2008, October 7, 2008, October 16, 2008, October 23, 2008, October 28, 2008, November 6, 2008, November 19, 2008, November 25, 2008, December 22, 2008, February 27, 2009, March 6, 2009, April 3, 2009 (2 separate letters), April 30, 2009, June 19, 2009, and August 10, 2009.

Documents may be examined, and/or copied for a fee, at the NRC's Public Document Room (PDR), located at One White Flint North, Public File Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible electronically from the Agencywide Documents Access and Management System (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html.* Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS should contact the NRC PDR Reference staff by telephone at 1–800–397–4209 or 301–415–4737, or send an e-mail to *pdr.resource@nrc.gov.*

Dated at Rockville, Maryland, this 1st day of December 2009.

For the Nuclear Regulatory Commission.

V. Sreenivas,

Project Manager, Plant Licensing Branch II–1, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. E9–29198 Filed 12–7–09; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2009–0539; Docket No. 040–00341]

Notice of Availability of Environmental Assessment and Finding of No Significant Impact for License Amendment to Source Materials License No. Stc-133, for Unrestricted Release of the Defense Logistics Agency, Defense National Stockpile Center, Hammond Depot Facility In Hammond, IN

AGENCY: Nuclear Regulatory Commission.

ACTION: Issuance of Environmental Assessment and Finding of No Significant Impact for License Amendment.

FOR FURTHER INFORMATION CONTACT: Betsy Ullrich, Senior Health Physicist, Commercial and R&D Branch, Division of Nuclear Materials Safety, Region I, 475 Allendale Road, King of Prussia, Pennsylvania 19406; telephone (610) 337–5040; fax number (610) 337–5269; or by e-mail: *Elizabeth.Ullrich@nrc.gov*.

SUPPLEMENTARY INFORMATION:

I. Introduction

The U.S. Nuclear Regulatory Commission (NRC) is considering the issuance of a license amendment to Source Materials License No. STC–133. This license is held by the Defense Logistics Agency, Defense National Stockpile Center (DLA/DNSC) (the Licensee), for its Hammond Depot (the Facility), located at 3200 Sheffield Avenue in Hammond, Indiana. Issuance of the amendment would authorize release of the Facility for unrestricted use. The Licensee requested this action in a letter dated February 3, 2006. The NRC has prepared an Environmental Assessment (EA) in support of this proposed action in accordance with the requirements of Title 10, Code of Federal Regulations (CFR), Part 51 (10 CFR Part 51). Based on the EA, the NRC has concluded that a Finding of No Significant Impact (FONSI) is appropriate with respect to the proposed action. The amendment will be issued to the Licensee following the publication of this FONSI and EA in the **Federal Register**.

II. Environmental Assessment

Identification of Proposed Action

The proposed action would approve the Licensee's February 3, 2006, license amendment request, resulting in release of the Facility for unrestricted use. License No. STC–133 as issued on February 14, 1957, pursuant to 10 CFR Part 40, and has been amended periodically since that time. This license authorized the Licensee to use natural uranium and thorium in the form of ores, concentrations and solids for the purpose of storage, sampling, repackaging and transfer for the activities of the Defense National Stockpile.

The Hammond Depot was originally sited on approximately 130 acres. During the 1970's, a large portion of the site was sold, including Warehouse 2 in which thorium nitrate had been stored. Warehouse 2 was remediated and released for unrestricted use prior to that sale. Because Warehouse 2 is separated from the current facilities, and because it was released for unrestricted use in the 1970's, Warehouse 2 is not part of this assessment. The current Facility is situated on 67 acres located in an industrial/commercial area, and consists of warehouse and outdoor storage areas. Within the Facility, use of licensed materials was confined to Buildings 100W, 100E, and 200E. These warehouse buildings each contain approximately 4,640 square meters (m^2) of storage space, although licensed materials were stored only in portions of each warehouse. Some soil contamination was identified in the former Burn Cage area (1,050 m^2) and Ferrochrome Pile #6 (2,800 m^2), as well as five smaller areas elsewhere on the site (10 m^2, 250 m^2, 10 m^2, 2 m^2 and 2 m^2), which may have resulted from transfer activities or from radioactive materials that were not required to be licensed by the Commission.

In 2005, the Licensee ceased licensed activities and initiated a survey and decontamination of the Facility. The Licensee conducted surveys of the Facility and provided information to the NRC to demonstrate that it meets the criteria in Subpart E of 10 CFR Part 20 for unrestricted release.

Need for the Proposed Action

The Licensee has ceased conducting licensed activities at the Facility, and seeks its unrestricted use.

Environmental Impacts of the Proposed Action

The historical review of licensed activities conducted at the Facility shows that such activities involved use of the following radionuclides with half-lives greater than 120 days: natural uranium and/or thorium in the forms of monazite sand, thorium nitrate, sodium sulfate, tantalum pentoxide, and columbium tantalum minerals, contained in fiber or steel drums. Prior to performing the final status survey, the Licensee conducted decontamination activities, as necessary, in the areas of the Facility affected by these radionuclides.

The Licensee conducted a final status survey during 2006 and 2007. This survey covered the three warehouses (Buildings 100W, 100E, and 200E) where licensed materials were stored as well as 7 outdoor areas (the Burn Cage area, the Ferrochrome Pile #6 area, and five additional small areas) where contaminated soil was identified. The final status survey report was attached to the Licensee's letter dated April 21, 2008. The Licensee elected to demonstrate compliance with the radiological criteria for unrestricted release as specified in 10 CFR 20.1402 by developing derived concentration guideline levels (DCGLs) for its Facility.

The Licensee conducted site-specific dose modeling using input parameters specific to the Facility that adequately bounded the potential dose. This included dose modeling for two scenarios: Building surfaces and soil. The building surfaces dose model was based on the warehouse worker scenario. The soil dose model was based on a resident farmer scenario. The Licensee thus determined the maximum amount of residual radioactivity on building surfaces, equipment, materials and soils that will satisfy the NRC requirements in Subpart E of 10 CFR Part 20 for unrestricted release. The NRC previously reviewed the Licensee's methodology and proposed DCGLs, and concluded that the proposed DCGLs are acceptable for use as release criteria at the Facility. The NRC's approval of the Licensee's proposed DCGLs was published in the **Federal Register** on November 30, 2007 (72 FR 67761). The Licensee's final status survey results are below these DCGLs, and are thus acceptable.

The NRC staff conducted a confirmatory survey during 2007. None of the confirmatory sample results exceeded the DCGLs established for the Facility. Based on its review, the staff has determined that the affected environment and any environmental impacts associated with the proposed action are bounded by the impacts evaluated by the ''Generic Environmental Impact Statement in Support of Rulemaking on Radiological Criteria for License Termination of NRC-Licensed Nuclear Facilities'' (NUREG–1496) Volumes 1–3 (ML042310492, ML042320379, and ML042330385). The staff finds there were no significant environmental impacts from the use of radioactive material at the Facility. The NRC staff reviewed the docket file records and the final status survey report to identify any non-radiological hazards that may have impacted the environment surrounding the Facility. No such hazards or impacts to the environment were identified. The NRC has identified no other radiological or non-radiological activities in the area that could result in cumulative environmental impacts.

The NRC staff finds that the proposed release of the Facility for unrestricted use is in compliance with 10 CFR 20.1402. Based on its review, the staff considered the impact of the residual radioactivity at the Facility and concluded that the proposed action will

not have a significant effect on the quality of the human environment.

Environmental Impacts of the Alternatives to the Proposed Action

Due to the largely administrative nature of the proposed action, its environmental impacts are small. Therefore, the only alternative the staff considered is the no-action alternative, under which the staff would leave things as they are by simply denying the amendment request. This no-action alternative is not feasible because it conflicts with the requirement in 10 CFR 40.42(d), that decommissioning of source material facilities be completed and approved by the NRC after licensed activities cease. The NRC's analysis of the Licensee's final status survey data confirmed that the Facility meets the requirements of 10 CFR 20.1402 for unrestricted release. Additionally, denying the amendment request would result in no change in current environmental impacts. The environmental impacts of the proposed action and the no-action alternative are therefore similar, and the no-action alternative is accordingly not further considered.

Conclusion

The NRC staff has concluded that the proposed action is consistent with the NRC's unrestricted release criteria specified in 10 CFR 20.1402. Because the proposed action will not significantly impact the quality of the human environment, the NRC staff concludes that the proposed action is the preferred alternative.

Agencies and Persons Consulted

NRC provided a draft of this EA to the Indiana State Department of Health, Indoor Air & Radiological Health Division for review on October 21, 2009. On November 2, 2009, the Indiana State Department of Health, Indoor Air & Radiological Health Division responded by electronic mail. The State agreed with the conclusions of the EA, and otherwise had no comments.

The NRC staff has determined that the proposed action is of a procedural nature, and will not affect listed species or critical habitat. Therefore, no further consultation is required under Section 7 of the Endangered Species Act. The NRC staff has also determined that the proposed action is not the type of activity that has the potential to cause effects on historic properties. Therefore, no further consultation is required under Section 106 of the National Historic Preservation Act.

III. Finding of No Significant Impact

The NRC staff has prepared this EA in support of the proposed action. On the basis of this EA, the NRC finds that there are no significant environmental impacts from the proposed action, and that preparation of an environmental impact statement is not warranted. Accordingly, the NRC has determined that a Finding of No Significant Impact is appropriate.

IV. Further Information

Documents related to this action, including the application for license amendment and supporting documentation, are available electronically at the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/adams.html*. From this site, you can access the NRC's Agencywide Documents Access and Management System (ADAMS), which provides text and image files of NRC's public documents. The documents related to this action are listed below, along with their ADAMS accession numbers, where available.

1. Letter dated February 3, 2006 (ML060580094) with attachments ''Historical Site Assessment * * *,'' August 2005 (ML060580605); ''Radiological Scoping Survey * * *,'' December 2005 (ML060580608); ''Preliminary Site-Specific Derived Concentration Guideline Levels * * *,'' January 2006 (ML060580629); and ''Environmental Assessment, Disposition of Thorium Nitrate'' October 2003 (ML060580592);

2. Letters dated July 5, 2006 (ML061870578), July 19, 2006 (ML062070231), September 19, 2006 (ML062710160) and September 29, 2006 (ML062760618);

3. Letter dated September 29, 2006, with the Decommissioning Plan dated September 2006 (ML062710179);

4. Letter dated January 12, 2007 (ML070160372);

5. Letter dated July 19, 2007 with the Final Status Survey Plan dated July 2007 (ML072010230);

6. Test America Lab Sample Survey Results received January 24, 2008 (ML080240408);

7. Letter dated April 21, 2008 [ML081200814] with the Final Status Survey Report dated April 2008 (ML081210688);

8. NUREG–1757, ''Consolidated NMSS Decommissioning Guidance'';

9. Title 10, Code of Federal Regulations, Part 20, Subpart E, ''Radiological Criteria for License Termination'';

10. Title 10, Code of Federal Regulations, Part 51, ''Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions''; and

11. NUREG–1496, ''Generic Environmental Impact Statement in Support of Rulemaking on Radiological Criteria for License Termination of NRC-Licensed Nuclear Facilities.''

If you do not have access to ADAMS, or if there are problems in accessing the documents located in ADAMS, contact the NRC Public Document Room (PDR) Reference staff at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr.resource@nrc.gov*. These documents may also be viewed electronically on the public computers located at the NRC's PDR, O 1 F21, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852. The PDR reproduction contractor will copy documents for a fee.

Dated at Region I, 475 Allendale Road, King of Prussia, this 30th day of November 2009.

For the Nuclear Regulatory Commission.

James Dwyer,

Chief, Commercial and R&D Branch, Division of Nuclear Materials Safety, Region I.

[FR Doc. E9–29197 Filed 12–7–09; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Sunshine Act; Meeting Notice

AGENCY HOLDING THE MEETINGS: Nuclear Regulatory Commission.

DATES: Weeks of December 7, 14, 21, 28, 2009, January 4, 11, 2010.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and closed.

Week of December 7, 2009

Tuesday, December 8, 2009

9:30 a.m. Briefing on the Proposed Rule: Enhancements to Emergency Preparedness Regulations (Public Meeting) (Contact: Lauren Quiñones, 301–415–2007)

This meeting will be webcast live at the Web address—*http://www.nrc.gov*

Week of December 14, 2009—Tentative

There are no meetings scheduled for the week of December 14, 2009.

Week of December 21, 2009—Tentative

There are no meetings scheduled for the week of December 21, 2009.

Week of December 28, 2009—Tentative

There are no meetings scheduled for the week of December 28, 2009.

Week of January 4, 2010—Tentative

There are no meetings scheduled for the week of January 4, 2010.

Week of January 11, 2010—Tentative

Tuesday, January 12, 2010

9:30 a.m. Briefing on Office of Nuclear Security and Incident Response—Programs, Performance, and Future Plans (Public Meeting) (Contact: John Biddison, 301–415–6795)

This meeting will be webcast live at the Web address—*http://www.nrc.gov.*

1:30 p.m. Briefing on Threat Environment Assessment (Closed—Ex. 1)

* * * * *

*The schedule for Commission meetings is subject to change on short notice. To verify the status of meetings, call (recording)—(301) 415–1292. Contact person for more information: Rochelle Bavol, (301) 415–1651.

* * * * *

The NRC Commission Meeting Schedule can be found on the Internet at: *http://www.nrc.gov/about-nrc/policy-making/schedule.html.*

* * * * *

The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in these public meetings, or need this meeting notice or the transcript or other information from the public meetings in another format (e.g. braille, large print), please notify the NRC's Disability Program Coordinator, Rohn Brown, at 301–492–2279, TDD: 301–415–2100, or by e-mail at *rohn.brown@nrc.gov.* Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

* * * * *

This notice is distributed electronically to subscribers. If you no longer wish to receive it, or would like to be added to the distribution, please contact the Office of the Secretary, Washington, DC 20555 (301–415–1969), or send an e-mail to *darlene.wright@nrc.gov.*

Dated: December 3, 2009.

Rochelle C. Bavol,

Office of the Secretary.

[FR Doc. E9–29311 Filed 12–4–09; 11:15 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 70–36; NRC–2009–0524]

Notice of License Amendment Request of Westinghouse Electric Company, LLC for Approval of Hematite Decommissioning Plan, Festus, Missouri and Opportunity To Request a Hearing

AGENCY: U.S. Nuclear Regulatory Commission.

ACTION: Notice of license amendment request and opportunity to request a hearing.

DATES: A request for a hearing must be filed by February 8, 2010.

FOR FURTHER INFORMATION CONTACT: John J. Hayes, Project Manager, Materials Decommissioning Branch, Division of Waste Management and Environmental Protection, Office of Federal and State Materials and Environmental Management Programs, U.S. Nuclear Regulatory Commission (NRC), Two White Flint North, Mail Stop T8 F5, 11545 Rockville Pike, Rockville, Maryland 20852–2738 Telephone: (301) 415–5928; fax number: (301) 415–5928; e-mail: *john.hayes@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

By application dated August 12, 2009, Westinghouse Electric Company, LLC (WEC or the licensee) submitted the Decommissioning Plan (DP) for its Hematite facility in Missouri to the U.S. Nuclear Regulatory Commission for approval. The DP and supporting documents for the Hematite Decommissioning Project (HDP) are located in ADAMS (ML092330136). WEC previously submitted a Decommissioning Funding Plan (ML091950063) on July 10, 2009, and a Physical Security Plan (PSP) and Contingency Procedures and the Fundamental Nuclear Material Control Program on August 5, 2009. All three documents will be evaluated as part of the NRC staff's detailed technical review of the DP. Public access to these documents is limited. The Fundamental Decommissioning Funding Plan and the Nuclear Material Control Program contain financial or commercial information which may be withheld from disclosure in accordance with 10 CFR 2.390(d). The PSP contains Safeguards Information (SGI).

The NRC performed an acceptance review of the DP and found it acceptable for the staff to begin its detailed technical review, as documented in a letter to WEC dated November 2, 2009 (ML093000418). If the NRC approves WEC's DP, the approval will be documented in an amendment to NRC License No. SNM–0033. However, before approving the proposed amendment, the NRC will need to make the findings required by the Atomic Energy Act of 1954, as amended, and the National Environmental Policy Act. These findings will be documented, respectively, in a Safety Evaluation Report (SER), and in a separate environmental analysis performed by the NRC.

III. Opportunity To Request a Hearing

By February 8, 2010, any person(s) seeking an NRC adjudicatory hearing whose interest may be affected by the proposed action must file a request for hearing/petition to intervene. As required by 10 CFR 2.309, a petition for leave to intervene shall set forth with particularity the interest of the petitioner/requestor in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted, and state the following; (1) the name, address and telephone number of the requestor or petitioner; (2) the nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding; (3) the nature and extent of the requestor's/petitioner's property, financial, or other interest in the proceeding; and (4) the possible effect of any decision or order which may be entered in the proceeding on the requestor's/petitioner's interest.

The petition must also identify the specific contentions which the petitioner/requestor seeks to have litigated at the proceeding. Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner/requestor shall provide a brief explanation of the bases for the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing. The petitioner must also provide references to all documents of which the petitioner is aware and on which the petitioner intends to rely in support of those facts or expert opinion. The petition must include sufficient information to show that a genuine dispute exists with WEC on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitle the petitioner/requestor to relief. A petitioner/

requestor who fails to satisfy these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing.

All documents filed in NRC adjudicatory proceedings, including a request for hearing, a petition for leave to intervene, any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene, and documents filed by interested governmental entities participating under 10 CFR 2.315(c), must be filed in accordance with the NRC E-Filing rule (72 FR 49139, Aug. 28, 2007). The E-Filing process requires participants to submit and serve all adjudicatory documents over the internet, or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek an exemption in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least ten (10) days prior to the filing deadline, the participant should contact the Office of the Secretary by e-mail at *hearing.docket@nrc.gov,* or by telephone at (301) 415–1677, to request (1) a digital ID certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a request or petition for hearing (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the hearing in this proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals/apply-certificates.html.* System requirements for accessing the E-Submittal server are detailed in NRC's ''Guidance for Electronic Submission,'' which is available on the agency's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* Participants may attempt to use other software not listed on the Web site, but should note that the NRC's E-Filing system does not support unlisted software, and the NRC Help Desk will not be able to offer assistance in using unlisted software.

If a participant is electronically submitting a document to the NRC in accordance with the E-Filing rule, the participant must file the document using the NRC's on-line, Web-based submission form. In order to serve documents through EIE, users will be required to install a Web browser plug-in from the NRC Web site. Further information on the web-based submission form, including the installation of the Web browser plug-in, is available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.*

Once a participant has obtained a digital ID certificate and a docket has been created, the participant can then submit a request for hearing or petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with NRC guidance available on the NRC public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* A filing is considered complete at the time the documents are submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an e-mail notice confirming receipt of the document. The E-Filing system also distributes an e-mail notice that provides access to the document to the NRC Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request/petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically using the agency's adjudicatory E-Filing system may seek assistance by contacting the NRC Meta-System Help Desk through the ''Contact Us'' link located on the NRC Web site at *http://www.nrc.gov/site-help/e-submittals.html*, by e-mail at *MSHD.Resource@nrc.gov*, or by a toll-free call at (866) 672–7640. The NRC Meta-System Help Desk is available between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday, excluding government holidays.

Participants who believe that they have a good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852, Attention: Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service. A presiding officer, having granted an exemption request from using E-Filing, may require a participant or party to use E-Filing if the presiding officer subsequently determines that the reason for granting the exemption from use of E-Filing no longer exists.

Documents submitted in adjudicatory proceedings will appear in NRC's electronic hearing docket which is available to the public at *http://ehd.nrc.gov/EHD_Proceeding/home.asp*, unless excluded pursuant to an order of the Commission, or the presiding officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

Petitions for leave to intervene must be filed no later than 60 days from December 8, 2009. Non-timely filings will not be entertained absent a determination by the presiding officer that the petition or request should be granted or the contentions should be admitted, based on a balancing of the factors specified in 10 CFR 2.309(c)(1)(i)–(viii).

IV. Further Information

Documents related to the proposed action, including the application for amendment and supporting documentation, are available electronically at the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/adams.html*. From this site, you can access the NRC's Agencywide Documents Access and Management System (ADAMS), which provides text and image files of NRC's public documents. The ADAMS accession numbers for the documents related to this notice are the Hematite Decommissioning Project (HDP) package (ADAMS No. ML092330136) and the acceptance letter to Westinghouse on the Decommissioning Plan Review (ML093000418). If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737 or by e-mail to *pdr.resource@nrc.gov*.

These documents may also be viewed electronically on the public computers located at the NRC's PDR at 11555 Rockville Pike, Rockville, Maryland 20852. The PDR reproduction contractor will copy documents for a fee.

Order Imposing Procedures for Access to Safeguards Information for Contention Preparation

A. This Order contains instructions regarding how potential parties to this proceeding may request access to documents containing Safeguards Information (SGI). Requirements for access to SGI are primarily set forth in 10 CFR Parts 2 and 73. Nothing in this Order is intended to conflict with the SGI regulations.

B. Within 10 days after publication of this notice of hearing and opportunity to petition for leave to intervene, any potential party who believes access to SGI is necessary to respond to this notice may request such access. A ''potential party'' is any person who intends to participate as a party by demonstrating standing and filing an admissible contention under 10 CFR 2.309. Requests for access to SGI submitted later than 10 days after publication will not be considered absent a showing of good cause for the late filing, addressing why the request could not have been filed earlier.

C. The requester shall submit a letter requesting permission to access SGI to the Office of the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemakings and Adjudications Staff, and provide a copy to the Associate General Counsel for Hearings, Enforcement and Administration, Office of the General Counsel, Washington, DC 20555–0001. The expedited delivery or courier mail address for both offices is: U.S. Nuclear Regulatory Commission, 11555 Rockville Pike, Rockville, Maryland 20852. The e-mail address for the Office of the Secretary and the Office of the General Counsel are *Hearing.Docket@nrc.gov* and *OGCmailcenter@nrc.gov,* respectively.[1] The request must include the following information:

A description of the licensing action with a citation to this **Federal Register** notice;

(1) The name and address of the potential party and a description of the potential party's particularized interest that could be harmed by the action identified in C.(1);

(2) The identity of each individual who would have access to SGI if the request is granted, including the identity of any expert, consultant, or assistant who will aid the requester in evaluating the SGI. In addition, the request must contain the following information:

(a) A statement that explains each individual's ''need to know'' the SGI, as required by 10 CFR 73.2 and 10 CFR 73.22(b)(1). Consistent with the definition of ''need to know'' as stated in 10 CFR 73.2, the statement must explain:

(i) Specifically why the requestor believes that the information is necessary to enable the requestor to proffer and/or adjudicate a specific contention in this proceeding; [2] and

(ii) The technical competence (demonstrable knowledge, skill, training or education) of the requester to effectively utilize the requested SGI to provide the basis and specificity for a proffered contention. The technical competence of a potential party or its counsel may be shown by reliance on a qualified expert, consultant, or assistant who satisfies these criteria.

(b) A completed Form SF–85, ''Questionnaire for Non-Sensitive Positions'' for each individual who would have access to SGI. The completed Form SF–85 will be used by the Office of Administration to conduct the background check required for access to SGI, as required by 10 CFR Part 2, Subpart G and 10 CFR 73.22(b)(2), to determine the requestor's trustworthiness and reliability. For security reasons, Form SF–85 can only be submitted electronically through the electronic questionnaire for investigations processing (e-QIP) Web site, a secure Web site that is owned and operated by the Office of Personnel Management. To obtain online access to the form, the requester should contact the NRC's Office of Administration at (301) 492–3524.[3]

(c) A completed Form FD–258 (fingerprint card), signed in original ink, and submitted in accordance with 10 CFR 73.57(d). Copies of Form FD–258 may be obtained by writing the Office of Information Services, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, by calling (301) 415–7232 or (301) 492–7311, or by email to *Forms.Resource@nrc.gov*. The fingerprint card will be used to satisfy the requirements of 10 CFR Part 2, 10 CFR 73.22(b)(1), and Section 149 of the Atomic Energy Act of 1954, as amended, which mandates that all persons with access to SGI must be fingerprinted for an FBI identification and criminal history records check;

(d) A check or money order payable in the amount of $200.00 [4] to the U.S. Nuclear Regulatory Commission for each individual for whom the request for access has been submitted; and

(e) If the requester or any individual who will have access to SGI believes they belong to one or more of the categories of individuals that are exempt from the criminal history records check and background check requirements in 10 CFR 73.59, the requestor should also provide a statement identifying which exemption the requestor is invoking and explaining the requestor's basis for believing that the exemption is applies. While processing the request, the Office of Administration, Personnel Security Branch, will make a final determination whether the claimed exemption applies. Alternatively, the requestor may contact the Office of Administration for an evaluation of their exemption status prior to submitting their request.

[1] While a request for hearing or petition to intervene in this proceeding must comply with the filing requirements of the NRC's ''E-Filing Rule,'' the initial request to access SGI under these procedures should be submitted as described in this paragraph.

[2] Broad SGI requests under these procedures are unlikely to meet the standard for need to know; furthermore, staff redaction of information from requested documents before their release may be appropriate to comport with this requirement. These procedures do not authorize unrestricted disclosure or less scrutiny of a requester's need to know than ordinarily would be applied in connection with an already-admitted contention or non-adjudicatory access to SGI.

[3] The requester will be asked to provide his or her full name, social security number, date and place of birth, telephone number, and e-mail address. After providing this information, the requester usually should be able to obtain access to the online form within one business day.

[4] This fee is subject to change pursuant to the Office of Personnel Management's adjustable billing rates.

Persons who are exempt from the background check are not required to complete the SF–85 or Form FD–258; however, all other requirements for access to SGI, including the need to know, are still applicable.

Note: Copies of documents and materials required by paragraphs C.(3)(b), (c), and (d) of this Order must be sent to the following address: Office of Administration, U.S. Nuclear Regulatory Commission, Personnel Security Branch, Mail Stop TWB–05–B32M, Washington, DC 20555–0012.

These documents and materials should not be included with the request letter to the Office of the Secretary, but the request letter should state that the forms and fees have been submitted as required above.

D. To avoid delays in processing requests for access to SGI, the requestor should review all submitted materials for completeness and accuracy (including legibility) before submitting them to the NRC. The NRC will return incomplete packages to the sender without processing.

E. Based on an evaluation of the information submitted under paragraph C.(3) above, as applicable, the NRC staff will determine within 10 days of receipt of the request whether:

(1) There is a reasonable basis to believe the petitioner is likely to establish standing to participate in this NRC proceeding; and

(2) The requestor has established a legitimate need to know the SGI requested.

F. If the NRC staff determines that the requestor has satisfied both E.(1) and E.(2) above, the Office of Administration will then determine, based upon completion of the background check, whether the proposed recipient is trustworthy and reliable, as required for access to SGI by 10 CFR 73.22(b). If the Office of Administration determines that the individual or individuals are trustworthy and reliable, the NRC will promptly notify the requestor in writing. The notification will provide the names of approved individuals as well as the conditions under which the SGI will be provided. These conditions may include, but are not limited to, the signing of a Non-Disclosure Agreement or Affidavit, or Protective Order [5] by each individual who will be granted access to SGI.

G. Release and Storage of SGI. Prior to providing SGI to the requestor, the NRC staff will conduct (as necessary) an inspection to confirm that the recipient's information protection system is sufficient to satisfy the requirements of 10 CFR 73.22. Alternatively, recipients may opt to view SGI at an approved SGI storage location rather than establish their own SGI protection program to meet SGI protection requirements.

H. Filing of Contentions. Any contentions in these proceedings that are based upon the information received as a result of the request made for SGI must be filed by the requestor no later than 25 days after the requestor is granted access to that information. However, if more than 25 days remain between the date the petitioner is granted access to the information and

I. The deadline for filing all other contentions (as established in the notice of hearing or opportunity for hearing), the petitioner may file its SGI contentions by that later deadline.

J. Review of Denials of Access.

(1) If the request for access to SGI is denied by the NRC staff either after a determination on standing and need to know, or after a determination on trustworthiness and reliability, the NRC staff shall immediately notify the requestor in writing, briefly stating the reason or reasons for the denial.

(2) Before the Office of Administration makes an adverse determination regarding the proposed recipient(s) trustworthiness and reliability for access to SGI, the Office of Administration, in accordance with 10 CFR 2.705(c)(3)(iii), must provide the proposed recipient(s) any records that were considered in the trustworthiness and reliability determination, including those required to be provided under 10 CFR 73.57(e)(1), so that the proposed recipient(s) have an opportunity to correct or explain the record.

(3) The requester may challenge the NRC staff's or Office of Administration's adverse determination by filing a request for review in accordance with 10 CFR 2.705(c)(3)(iv). Further appeals of decisions under this paragraph must be made pursuant to 10 CFR 2.311.

K. Review of Grants of Access. A party other than the requester may challenge an NRC staff determination granting access to SGI whose release would harm that party's interest independent of the proceeding. Such a challenge must be filed with the Chief Administrative Judge within 5 days of the notification by the NRC staff of its grant of access.

If challenges to the NRC staff determinations are filed, these procedures give way to the normal process for litigating disputes concerning access to information. The availability of interlocutory review by the Commission of orders ruling on such NRC staff determinations (whether granting or denying access) is governed by 10 CFR 2.311.[6]

L. The Commission expects that the NRC staff and presiding officers (and any other reviewing officers) will consider and resolve requests for access to SGI, and motions for protective orders, in a timely fashion in order to minimize any unnecessary delays in identifying those petitioners who have standing and who have propounded contentions meeting the specificity and basis requirements in 10 CFR Part 2. Attachment 1 to this Order summarizes the general target schedule for processing and resolving requests under these procedures.

It is so ordered.

Dated at Rockville, Maryland, this 2nd day of December 2009.

For the Commission.

Annette L. Vietti-Cook,

Secretary of the Commission.

[5] Any motion for Protective Order or draft Non-Disclosure Affidavit or Agreement for SGI must be filed with the presiding officer or the Chief Administrative Judge if the presiding officer has not yet been designated, within 180 days of the deadline for the receipt of the written access request.

[6] Requesters should note that the filing requirements of the NRC's E-Filing Rule (72 FR 49139; August 28, 2007) apply to appeals of NRC staff determinations (because they must be served on a presiding officer or the Commission, as applicable), but not to the initial SGI request submitted to the NRC staff under these procedures.

ATTACHMENT 1—GENERAL TARGET SCHEDULE FOR PROCESSING AND RESOLVING REQUESTS FOR ACCESS TO SAFEGUARDS INFORMATION IN THIS PROCEEDING

Day	Event/Activity
0	Publication of Federal Register notice of hearing and opportunity to petition for leave to intervene, including order with instructions for access requests.
10	Deadline for submitting requests for access to Safeguards Information (SGI) with information: supporting the standing of a potential party identified by name and address; describing the need for the information in order for the potential party to participate meaningfully in an adjudicatory proceeding; demonstrating that access should be granted (e.g., showing technical competence for access to SGI); and including the application fee for the fingerprint/background check.
60	Deadline for submitting petition for intervention containing: (i) Demonstration of standing; (ii) all contentions whose formulation does not require access to SGI (+25 Answers to petition for intervention; +7 petitioner/requestor reply).
20	Nuclear Regulatory Commission (NRC) staff informs the requester of the staff's determination whether the request for access provides a reasonable basis to believe standing can be established and shows need to know. If NRC staff makes the finding of need to know for SGI and likelihood of standing, NRC staff begins background check (including fingerprinting for a criminal history records check), information processing (preparation of redactions or review of redacted documents), and readiness inspections.
25	If NRC staff finds no ''need to know,'' or no likelihood of standing, the deadline for petitioner/requester to file a motion seeking a ruling to reverse the NRC staff's denial of access; NRC staff files copy of access determination with the presiding officer (or Chief Administrative Judge or other designated officer, as appropriate.
30	Deadline for NRC staff reply to motions to reverse NRC staff determination(s).
190	(Receipt +180) If NRC staff finds standing, need to know for SGI, and trustworthiness and reliability, deadline for NRC staff to file motion for Protective Order and draft Non-disclosure Affidavit (or to make a determination that the proposed recipient of SGI is not trustworthy or reliable). Note: Before the Office of Administration makes an adverse determination regarding access to SGI, the proposed recipient must be provided an opportunity to correct or explain information.
205	Deadline for petitioner to seek reversal of a final adverse NRC staff trustworthiness or reliability determination either before the presiding officer or another designated officer under 10 CFR 2.705(c)(3)(iv).

[FR Doc. E9–29202 Filed 12–7–09; 8:45 am]
BILLING CODE 7590–01–P

OFFICE OF PERSONNEL MANAGEMENT

Excepted Service

AGENCY: U.S. Office of Personnel Management (OPM).

ACTION: Notice.

SUMMARY: This gives notice of OPM decisions granting authority to make appointments under Schedules A, B, and C in the excepted service as required by 5 CFR 213.103.

FOR FURTHER INFORMATION CONTACT: Roland Edwards, Executive Resources Services Group, Center for Performance Management Systems and Evaluation, Division for Human Capital Leadership and Merit System Accountability, 202–606–2246.

SUPPLEMENTARY INFORMATION: Appearing in the listing below are the individual authorities established under Schedules A, B, and C between October 1, 2009 and October 31, 2009.These notices are published monthly in the **Federal Register** at *www.gpoaccess.gov/fr/*. A consolidated listing of all authorities as of June 30 is also published each year. The following Schedules are not codified in the code of Federal Regulations. These are agency specific exceptions.

Schedule A

No Schedule A authorities to report during October 2009.

Schedule B

No Schedule B authorities to report during October 2009.

Schedule C

The following Schedule C appointments were approved during October 2009.

Office of Management and Budget

BOGS01019 Confidential Assistant to the Associate Director for Performance Management. Effective October 23, 2009.

Office of National Drug Control Policy

QQGS90010 Senior Policy Advisor to the Director. Effective October 2, 2009.

Office of Science and Technology Policy

TSGS09005 Confidential Assistant to the Associate Director, Technology. Effective October 16, 2009.

Department of State

DSGS70053 Legislative Liaison Specialist to the Assistant Secretary for Near Eastern and South Asian Affairs. Effective October 6, 2009.

DSGS69922 Staff Assistant to the Director, Policy Planning Staff. Effective October 27, 2009.

DSGS69950 Staff Assistant to the Secretary of State. Effective October 27, 2009.

DSGS69924 Program Assistant, Visits to the Chief of Protocol. Effective October 30, 2009.

DSGS69926 Staff Assistant to the Assistant Secretary. Effective October 30, 2009.

DSGS69984 Public Affairs Specialist for Public Affairs. Effective October 30, 2009.

Department of the Treasury

DYGS00448 Confidential Assistant to the Senior Advisor. Effective October 13, 2009.

Department of Defense

DDGS17259 Special Assistant to the Principal Deputy Assistant Secretary of Defense for Legislative Affairs. Effective October 9, 2009.

DDGS17260 Special Assistant to the Principal Deputy Assistant Secretary of Defense for Legislative Affairs. Effective October 21, 2009.

DDGS17261 Speechwriter to the Principal Deputy Assistant Secretary of Defense for Public Affairs. Effective October 26, 2009.

Department of the Navy

DNGS09680 Special Assistant to the Secretary of the Navy. Effective October 21, 2009.

Department of the Air Force

DFGS60021 Special Assistant, Financial Administration and Programs to the Assistant Secretary for Financial Management and Comptroller. Effective October 21, 2009.

Department of Justice

DJGS00527 Counsel to the Assistant Attorney General. Effective October 21, 2009.
DJGS00548 Counsel to the Assistant Attorney General. Effective October 26, 2009.
DJGS00549 Counsel to the Assistant Attorney General. Effective October 26, 2009.

Department of Homeland Security

DMGS00646 Assistant Press Secretary. Effective October 5, 2009.
DMGS00726 Chief of Staff to the Assistant Secretary for Policy. Effective October 13, 2009.
DMGS00838 Business Liaison to the Assistant Secretary for the Private Sector. Effective October 21, 2009.
DMGS00839 Director of Communications to the Assistant Secretary for Immigration and Customs Enforcement. Effective October 21, 2009.

Department of the Interior

DIGS60134 Chief, Congressional and Legislative Affairs Office to the Deputy Commissioner. Effective October 23, 2009.

Department of Commerce

DCGS00262 Confidential Assistant to the Chief of Staff for International Trade Administration. Effective October 2, 2009.
DCGS00547 Special Assistant to the Under Secretary of Commerce for Intellectual Property and Director of the US Patent and Trademark Office. Effective October 2, 2009.
DCGS60163 Special Advisor to the Assistant Secretary for Market Access and Compliance. Effective October 2, 2009.
DCGS00025 Associate Director of Legislative Affairs to the Director, Office of Legislative Affairs. Effective October 6, 2009.
DCGS00072 Chief of Staff to the Assistant Secretary for Economic Development. Effective October 15, 2009.
DCGS00467 Senior Advisor and Director of Strategic Initiatives to the Assistant Secretary for Economic Development. Effective October 15, 2009.
DCGS00662 Press Secretary to the Chief of Staff for the National Telecommunications and Information Administration. Effective October 15, 2009.

Department of Labor

DLGS60242 Policy Advisor to the Deputy Assistant Secretary. Effective October 1, 2009.
DLGS60138 Special Assistant to the Deputy Secretary of Labor. Effective October 9, 2009.
DLGS60234 Policy Advisor to the Deputy Assistant Secretary. Effective October 14, 2009.
DLGS60099 Special Assistant to the Assistant Secretary for Employment and Training. Effective October 15, 2009.
DLGS60257 Senior Legislative Officer to the Assistant Secretary for Congressional and Intergovernmental Affairs. Effective October 15, 2009.
DLGS60015 Legislative Assistant to the Assistant Secretary for Congressional and Intergovernmental Affairs. Effective October 16, 2009.
DLGS60145 Legislative Assistant to the Assistant Secretary for Congressional and Intergovernmental Affairs. Effective October 16, 2009.
DLGS60123 Special Assistant to the Deputy Under Secretary for International Affairs. Effective October 22, 2009.
DLGS60222 Staff Assistant to the Deputy Under Secretary for International Affairs. Effective October 22, 2009.
DLGS60177 Special Assistant to the Assistant Secretary for Employee Benefits Security. Effective October 29, 2009.

Department of Health and Human Services

DHGS60035 Confidential Assistant to the Administrator, Centers for Medicare and Medicaid Services. Effective October 5, 2009.
DHGS60166 Press Secretary to the Deputy Assistant Secretary for Public Affairs. Effective October 5, 2009.
DHGS60027 Deputy Director to the Director of Scheduling and Advance. Effective October 26, 2009.

Department of Education

DBGS00278 Special Assistant to the Deputy Assistant Secretary. Effective October 6, 2009.
DBGS00630 Special Assistant to the Assistant Deputy Secretary for Innovation and Improvement. Effective October 6, 2009.
DBGS00367 Special Assistant to the Assistant Deputy Secretary for Innovation and Improvement. Effective October 9, 2009.
DBGS00211 Special Assistant to the Assistant Secretary for Planning, Evaluation, and Policy Development. Effective October 15, 2009.
DBGS00563 Confidential Assistant to the Assistant Secretary for Elementary and Secondary Education. Effective October 15, 2009.
DBGS00032 Confidential Assistant to the Deputy Chief of Staff for Strategy. Effective October 20, 2009.
DBGS00072 Special Assistant to the Director, Scheduling and Advance Staff. Effective October 20, 2009.
DBGS00685 Deputy Assistant Secretary for International and Foreign Language Education to the Assistant Secretary for Postsecondary Education. Effective October 20, 2009.
DBGS00484 Deputy Assistant Secretary for Rural Outreach to the Assistant Secretary, Office of Communications and Outreach. Effective October 27, 2009.
DBGS00219 Special Assistant to the Assistant Secretary, Office of Communications and Outreach. Effective October 29, 2009.

Environmental Protection Agency

EPGS10001 Senior Counsel to the Assistant Administrator for Air and Radiation. Effective October 9, 2009.

Federal Communications Commission

FCGS90146 Special Assistant to the Director, Office of Strategic Planning and Policy Analysis. Effective October 6, 2009.

Department of Veterans Affairs

DVGS60051 Legislative Assistant to the Assistant Secretary for Congressional and Legislative Affairs. Effective October 2, 2009.

Department of Energy

DEGS00772 Deputy Chief of Staff to the Chief of Staff. Effective October 1, 2009.
DEGS00773 Special Assistant to the Assistant Secretary of Energy. Effective October 1, 2009.
DEGS00774 Senior Advisor to the Assistant Secretary of Energy. Effective October 1, 2009.
DEGS00775 Staff Assistant to the Chief of Staff. Effective October 8, 2009.
DEGS00776 Senior Advisor to the Principal Deputy Assistant Secretary. Effective October 27, 2009.

Federal Energy Regulatory Commission

DRGS00028 Director, Congressional and Intergovernmental Affairs Division. Effective October 29, 2009.

Small Business Administration

SBGS00690 Deputy Assistant Administrator for Congressional and

Legislative Affairs to the Chief of Staff. Effective October 29, 2009.

SBGS00689 Press Assistant to the Assistant Administrator, Office of Communications and Public Liaison. Effective October 30, 2009.

General Services Administration

GSGS01433 Public Affairs Specialist to the Deputy Associate Administrator for Communications and Marketing. Effective October 8, 2009.

GSGS01425 Regional Administrator to the Senior Counselor. Effective October 22, 2009.

GSGS01426 Regional Administrator to the Senior Counselor. Effective October 22, 2009.

National Aeronautics and Space Administration

NNGS03296 Special Assistant (Scheduling) to the Chief of Staff. Effective October 14, 2009.

National Credit Union Administration

CUOT01373 Staff Assistant to the Chairman. Effective October 21, 2009.

Commodity Futures Trading Commission

CTOT00086 Special Assistant to a Commissioner. Effective October 30, 2009.

National Endowment for the Humanities

NHGS60075 Director of Communications to the Deputy Chairman. Effective October 6, 2009.

NHGS60066 Executive Assistant to the Chairman. Effective October 27, 2009.

Department of Transportation

DTGS60173 Director of Congressional Affairs to the Administrator. Effective October 5, 2009.

National Transportation Safety Board

TBGS71538 Special Assistant to a Member. Effective October 13, 2009.

Authority: 5 U.S.C. 3301 and 3302; E.O. 10577, 3 CFR 1954–1958 Comp., p. 218.

Office of Personnel Management.

John Berry,

Director.

[FR Doc. E9–29191 Filed 12–7–09; 8:45 am]

BILLING CODE 6325–39–P

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2010–12 and R2010–2; Order No. 346]

New Postal Product

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recently-filed Postal Service request to add the Canada Post—United States Postal Service Contractual Bilateral Agreement for Inbound Market Dominant Services to the Market Dominant Product List. The Postal Service has also filed a related contract. This notice addresses procedural steps associated with these filings.

DATES: Comments are due: December 9, 2009.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov*. Commenters who cannot submit their views electronically should contact the person identified in ''FOR FURTHER INFORMATION CONTACT'' by telephone for advice on alternatives to electronic filing.

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, General Counsel, 202–789–6820 or *stephen.sharfman@prc.gov*.

SUPPLEMENTARY INFORMATION:

I. Introduction

On November 19, 2009, the Postal Service filed a request pursuant to 39 U.S.C. 3622(c)(10) and 3642, and 39 CFR 3010.40 *et seq.* and 3020.30 *et seq.* to add the Canada Post—United States Postal Service Contractual Bilateral Agreement for Inbound Market Dominant Services (Bilateral Agreement) to the Market Dominant Product List.[1] This Request has been assigned Docket No. MC2010–12.

The Postal Service contemporaneously filed notice that the Governors have authorized a Type 2 rate adjustment to establish rates for inbound market dominant services as reflected in the Bilateral Agreement.[2] More specifically, the Bilateral Agreement, which has been assigned Docket No. R2010–2, governs the exchange of inbound air and surface letter post (LC/AO).[3]

Request. In support of its Request, the Postal Service filed the following materials: (1) Proposed Mail Classification Schedule (MCS) language;[4] (2) a Statement of Supporting Justification as required by 39 CFR 3020.32;[5] (3) a redacted version of the agreement; [6] and (4) an application for non-public treatment of pricing and supporting documents filed under seal.[7] Request at 2.

In the Statement of Supporting Justification, Lea Emerson, Executive Director, International Postal Affairs, reviews the factors of section 3622(c) and concludes, *inter alia*, that the revenues generated will cover the attributable costs of the services offered under the Bilateral Agreement; that the rates are preferable to default rates set by the Universal Postal Union; and that the rates represent a modest increase over those reflected in the existing bilateral agreement with Canada Post. *Id.*, Attachment 2, at 2–3.

In its Request, the Postal Service provides information responsive to part 3010, subpart D, of the Commission's rules. To that end, it addresses the requirements of section 3622(c)(10) as well as certain details of the negotiated service agreement. *Id.* at 2–7. The Postal Service asserts that the Bilateral Agreement satisfies all applicable statutory criteria. *Id.* at 6–8.

The Postal Service filed much of the supporting materials, financial analysis, and specific Bilateral Agreement under seal. *Id.* at 2. In its Request, the Postal Service maintains that the Bilateral Agreement and related financial information should remain under seal. *Id.*

The Postal Service has an existing bilateral agreement with Canada Post which is set to expire December 31, 2009.[8] *Id.* at 7. The instant Bilateral Agreement represents a 1-year extension of the existing agreement, with some modifications. The modifications include differences in specific operational details of the two agreements and the Postal Service's decision to classify Canada Post's ''Xpresspost-USA'' as a competitive product instead of a market dominant product as in the existing bilateral agreement.[9] The agreement states it has an effective date of January 1, 2010. *Id.* at 3. The Request states that the inbound

[1] Request of the United States Postal Service to Add Canada Post—United States Postal Service Contractual Bilateral Agreement for Inbound Market Dominant Services to the Market Dominant Product List, Notice of Type 2 Rate Adjustment, and Notice of Filing Agreement (Under Seal), November 19, 2009, and United States Postal Service Notice of Erratum to Application for Non-Public Treatment, November 20, 2009 (Request).

[2] Type 2 rate adjustments involve negotiated service agreements. *See* 39 CFR 3010.5.

[3] To elaborate, the Bilateral Agreement covers Letter Post, including letters, flats, packets, containers, and International Registered Mail service ancillary thereto. Request at 3–4.

[4] Attachment 1 to the Request.

[5] Attachment 2 to the Request.

[6] Attachment 3 to the Request.

[7] Attachment 4 to the Request.

[8] The Postal Service maintains that the instant Bilateral Agreement is functionally comparable to the agreement in Docket Nos. MC2009–7 and R2009–1.

[9] The Postal Service states that it will present Xpresspost-USA in a future filing with the Commission. *Id.* at 8, n.10.

market dominant rates are scheduled to become effective on January 4, 2010. *Id.*

The Postal Service urges the Commission to act promptly to add this product to the Market Dominant Product List to allow rates to be implemented under 39 CFR 3010.40. *Id.* at 9.

II. Notice of Filings

Pursuant to 39 U.S.C. 3622 and 3642, the Commission establishes Docket Nos. MC2010–12 and R2010–2 for consideration of the Request pertaining to the proposed Canada Post—United States Postal Service Contractual Bilateral Agreement product and the related Bilateral Agreement, respectively. In keeping with practice, these dockets are addressed on a consolidated basis for purposes of this order; however, future filings should be made in the specific docket in which issues being addressed pertain.

Interested persons may submit comments on whether the Postal Service's filings in the captioned dockets are consistent with the policies of 39 U.S.C. 3622 and 3642, 39 CFR part 3010.40, and 39 CFR 3020 subpart B. The due date for comments is December 9, 2009. The public portions of these filings can be accessed via the Commission's Web site *http://www.prc.gov*.

The Commission appoints Paul L. Harrington to serve as Public Representative in these dockets.

III. Ordering Paragraphs

It is ordered:

1. The Commission establishes Docket Nos. MC2010–12 and R2010–2 for consideration of the matters raised in each docket.

2. Pursuant to 39 U.S.C. 505, Paul L. Harrington is appointed to serve as officer of the Commission (Public Representative) to represent the interests of the general public in these proceedings.

3. Comments by interested persons in these proceedings are due no later than December 9, 2009.

4. The Secretary shall arrange for publication of this order in the **Federal Register**.

By the Commission.

Judith M. Grady,

Acting Secretary.

[FR Doc. E9–29224 Filed 12–7–09; 8:45 am]

BILLING CODE 7710–FW–S

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #11941 and #11942]

North Carolina Disaster # NC–00022

AGENCY: U.S. Small Business Administration .

ACTION: Notice.

SUMMARY: This is a notice of an Administrative declaration of a disaster for the State of North Carolina dated 12/02/2009.

Incident: Severe Nor'easter coupled with the remnants of Hurricane Ida.

Incident Period: 11/10/2009 through 11/15/2009.

Effective Date: 12/02/2009.

Physical Loan Application Deadline Date: 02/01/2010.

Economic Injury (EIDL) Loan Application Deadline Date: 09/02/2010.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the Administrator's disaster declaration, applications for disaster loans may be filed at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Dare.

Contiguous Counties:

North Carolina: Currituck, Hyde, Tyrrell.

The Interest Rates are:

	Percent
For Physical Damage:	
Homeowners With Credit Available Elsewhere	5.125
Homeowners Without Credit Available Elsewhere	2.562
Businesses With Credit Available Elsewhere	6.000
Businesses Without Credit Available Elsewhere	4.000
Non-Profit Organizations With Credit Available Elsewhere	3.625
Non-Profit Organizations Without Credit Available Elsewhere	3.000
For Economic Injury:	
Businesses And Small Agricultural Cooperatives Without Credit Available Elsewhere	4.000
Non-Profit Organizations Without Credit Available Elsewhere	3.000

The number assigned to this disaster for physical damage is 11941 6 and for economic injury is 11942 0.

The State which received an EIDL Declaration # is North Carolina.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

Dated: December 2, 2009.

Karen G. Mills,

Administrator.

[FR Doc. E9–29206 Filed 12–7–09; 8:45 am]

BILLING CODE 8025–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61085; File No. SR–NASDAQ–2009–101]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to the Nasdaq Rule 4000 and 5000 Series To Correct Certain Citations to Renumbered Rules

December 1, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 23, 2009, The NASDAQ Stock Market LLC (''Nasdaq'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by Nasdaq. Nasdaq has designated the proposed rule change as constituting a non-controversial rule change under Rule 19b–4(f)(6) under the Act,[3] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

Nasdaq proposes to correct certain citations in the Rule 4000 and 5000 Series that currently cite to rules that have been renumbered.

The text of the proposed rule change is available at *http://nasdaqomx.cchwallstreet.com/,* at NASDAQ's principal office, and at the Commission's Public Reference Room.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 17 CFR 240.19b–4(f)(6).

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, Nasdaq included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. Nasdaq has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Nasdaq is proposing to update rule cross-references found in the Rule 4000 and 5000 Series, which are no longer accurate due to renumbering of the cited rules. On March 12, 2009, Nasdaq filed a proposed rule change to revise the rules relating to the qualification, listing, and delisting of companies listed on, or applying to list on, Nasdaq to improve the organization of the rules, eliminate redundancies and simplify the rule language.[4] These rules (the ''New Listing Rules'') were operative April 13, 2009, and resulted in the relocation of Nasdaq's listing rules from the Rule 4000 Series to the Rule 5000 Series of the Nasdaq rulebook, without changing the substance of those rules. Nasdaq inadvertently failed to change certain cross-references in Rules 4120 and 7018 to reflect this move. Accordingly, Nasdaq is proposing to update the cross-references with accurate citations.

Nasdaq has also observed that a cross-reference to a FINRA rule found in Rule 5210(h) is no longer accurate due to FINRA renumbering prior NASD Rule 2810 as it was adopted into the FINRA consolidated rulebook. Rule 2810 was renumbered by FINRA to new Rule 2310 with no material changes.[5] As a consequence, Nasdaq is proposing to update Rule 5210(h) with the correct citation to FINRA Rule 2310.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[6] in general and with Sections 6(b)(5) of the Act,[7] in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The proposed rule change is consistent with these provisions in that it will eliminate confusion about Nasdaq rules by updating inaccurate cross-references to rules that have been renumbered, without changing the substance of those rules.

B. Self-Regulatory Organization's Statement on Burden on Competition

Nasdaq does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)[8] of the Act and Rule 19b–4(f)(6) thereunder.[9] At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. Nasdaq believes that the proposed rule change does not significantly affect the protection of investors or the public interest because it merely corrects cross-references to rules that have been renumbered. In each instance, the cross-referenced rule was not materially changed.

Nasdaq requests that the Commission waive the 30-day pre-operative waiting period contained in Exchange Act Rule 19b–4(f)(6)(iii). Nasdaq requests this waiver so that the corrected citations can be immediately operative, eliminating any potential confusion caused by the currently invalid citations.

The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because it will eliminate confusion caused by the currently invalid citations.[10] Application of the new rules should help foster consistency in the rulebook and promote clarity for market participants relying upon the rulebook. For these reasons, the Commission designates that the proposed rule change become immediately operative.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NASDAQ–2009–101 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2009–101. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written

[4] Securities Exchange Act Release No. 59663 (March 31, 2009), 74 FR 15552 (April 6, 2009) (SR–NASDAQ–2009–018).

[5] Securities Exchange Act Release No. 59987 (May 27, 2009), 74 FR 26902 (June 4, 2009).

[6] 15 U.S.C. 78f.

[7] 15 U.S.C. 78f(b)(5).

[8] 15 U.S.C. 78s(b)(3)(A).

[9] 17 CFR 240.19b–4(f)(6).

[10] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposal's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File Number SR–NASDAQ–2009–101 and should be submitted on or before December 29, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–29129 Filed 12–7–09; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61083; File No. SR–FINRA–2009–084]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change To Adopt FINRA Rule 5330 (Adjustment of Orders) in the Consolidated FINRA Rulebook

December 1, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 24, 2009, Financial Industry Regulatory Authority, Inc. (''FINRA'') (f/k/a National Association of Securities Dealers, Inc. (''NASD'')) filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by FINRA. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

FINRA is proposing to adopt NASD Rule 3220 (Adjustment of Open Orders) as a FINRA rule in the consolidated FINRA rulebook with several changes and to renumber NASD Rule 3220 as FINRA Rule 5330 in the consolidated FINRA rulebook.

The text of the proposed rule change is available on FINRA's Web site at *http://www.finra.org,* at the principal office of FINRA and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, FINRA included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. FINRA has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

As part of the process of developing a new consolidated rulebook (''Consolidated FINRA Rulebook''),[3] FINRA is proposing to adopt NASD Rule 3220 (Adjustment of Open Orders) into the Consolidated FINRA Rulebook with several changes, which are described below.

NASD Rule 3220 sets forth the requirements a member has regarding an open order held by the member when the order involves a security that is subject to a dividend, payment, or distribution.[4] Paragraph (a) of the rule sets forth how members are to adjust the terms of open orders, depending upon whether the dividend, payment, or distribution is in cash, stock, combined cash and stock, or determined by the stockholder. Under the rule, members are required to adjust open orders as follows:

- In the case of a cash dividend or distribution, the price of the open order is reduced by the dollar amount of the dividend or distribution and rounded down to the next lowest minimum quotation variation.
- In the case of a stock dividend or split, the price of the open order is reduced by rounding the dollar value of the dividend distribution or split to the next higher minimum quotation variation and subtracting that amount from the price of the order. The size of the order is increased by multiplying the size of the original order by the numerator of the ratio of the dividend or split, dividing the result by the denominator of the ratio of the dividend or split and then rounding the result to the next lower round lot.
- In the case of a dividend payable in either cash or securities at the option of the stockholder, the price of the open order is reduced by the dollar value of the cash or securities, whichever is greater, as determined by the formulas described above.

If the value of a distribution cannot be determined, paragraph (b) of the rule prohibits members from executing or permitting the execution of open orders without first reconfirming the order with the customer. Paragraph (c) requires members to cancel all open orders if a security is the subject of a reverse split. The rule also includes a list of order types to which it does not apply and a provision addressing the conversion of securities from fractional pricing to decimal pricing.

The proposed rule change includes substantive changes, as well as multiple wording and organizational changes, that conform much of the FINRA rule to the analogous Nasdaq and NYSE–Arca rules.[5] The proposed rule change also updates certain provisions of the rule that refer to trading in fractional amounts (as opposed to decimals).

First, the proposed rule change provides that, after adjusting an open order in the case of a stock dividend or

[11] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The current FINRA rulebook consists of (1) FINRA Rules; (2) NASD Rules; and (3) rules incorporated from NYSE (''Incorporated NYSE Rules'') (together, the NASD Rules and Incorporated NYSE Rules are referred to as the ''Transitional Rulebook''). While the NASD Rules generally apply to all FINRA members, the Incorporated NYSE Rules apply only to those members of FINRA that are also members of the NYSE (''Dual Members''). The FINRA Rules apply to all FINRA members, unless such rules have a more limited application by their terms. For more information about the rulebook consolidation process, *see Information Notice,* March 12, 2008 (Rulebook Consolidation Process).

[4] For purposes of the rule, an ''open order'' is an order to buy or an open stop order to sell. These include, for example, ''good 'til cancelled,'' ''limit,'' and ''stop limit'' orders that remain in effect for a definite or indefinite period of time until executed, cancelled, or expired. *See* NASD Rule 3220(d).

[5] *See* Nasdaq Rule 4761; NYSE–Arca Rule 7.39. Although the NYSE has a rule regarding the adjustment of orders (NYSE Rule 118), the Transitional Rulebook does not include the provision. Consequently, NASD Rule 3220 is the only FINRA rule addressing the adjustment of orders.

split, the order should be rounded down to the next lowest share, rather than the next lowest round lot. Although NYSE Rule 118 requires rounding down to the next lowest round lot, both Nasdaq Rule 4761 and NYSE–Arca Rule 7.39 require that, after being adjusted, orders be rounded down to the next lowest share. FINRA believes that rounding to the next lowest share, rather than the next lowest round lot, will result in an adjustment that more accurately reflects the customer's initial intent when placing the order.[6]

Second, the proposed rule change clarifies the treatment of open orders involving securities that are subject to a combined cash and stock dividend/split. Unlike Nasdaq Rule 4761 and NYSE–Arca Rule 7.39, NASD Rule 3220 does not directly address the adjustment requirements if a security is subject to a combined cash and stock dividend/split. The proposed rule change makes the provision consistent with the analogous Nasdaq and NYSE–Arca rules by specifying that, in these circumstances, members should calculate the cash portion of the adjustment using the existing formula in subparagraph (1) of the rule and should calculate the stock portion of the adjustment using the existing formula in subparagraph (2) of the rule.

Third, the proposed rule change applies the provision regarding reverse splits to all orders (both buy and sell) rather than just ''open orders,'' as that term is defined in the rule.[7] Thus, the proposed rule broadens the obligation of members to cancel orders involving securities subject to a reverse split and requires that all such orders be cancelled.

In addition to the conforming changes described above, FINRA is proposing one additional substantive change to the rule. NASD Rule 3220 provides that some pending customer orders (*e.g.,* open sell orders and open stop orders to buy) are not adjusted if there is a stock split in the security, notwithstanding that a stock split could have a significant impact on the price of the security. This could be detrimental to a customer with a pending order in the security, as the order may become inconsistent with the customer's original intent and/or unexecutable. Therefore, the proposed rule change requires members to notify customers who have pending orders that are not otherwise required to be adjusted under the rule of any stock splits in the security.

Finally, the proposed rule change updates the language in the rule regarding trading in fractional amounts and deletes the portion of the rule addressing the conversion from fractional pricing to decimal pricing.

FINRA will announce the implementation date of the proposed rule change in a *Regulatory Notice* to be published no later than 90 days following Commission approval.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[8] which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. FINRA believes that the proposed rule change will bring more uniformity to the treatment of open orders and will enhance customer protection with respect to pending orders involving securities that are the subject of a stock split or reverse split.

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–FINRA–2009–084 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–FINRA–2009–084. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission,[9] all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available

[6] FINRA notes that, when Nasdaq amended its open order adjustment rule in 2002, Nasdaq stated that it believed that rounding adjusted orders to the next lowest share ''will result in more accurate representation of buying and selling interest.'' *See* Securities Exchange Act Release No. 45968 (May 20, 2002), 67 FR 36946 (May 28, 2002). Like NASD Rule 3220, NYSE Rule 118 requires that, after adjustment, orders be rounded down to the next lowest round lot. The proposed rule will continue to exclude any order ''governed by the rules of a national securities exchange.'' Consequently, an order subject to the rules of the NYSE will continue to be rounded as required under NYSE rules. Moreover, if a customer wants to avoid the potential of having an order rounded down in a manner that results in an odd lot, the customer could include any such instructions at the time it gives the member the order.

[7] This proposed change will conform the FINRA rule to the analogous provisions in the NYSE, Nasdaq, and NYSE–Arca rules. *See* Nasdaq Rule 4761(c)(6); NYSE–Arca Rule 7.39(b)(5); NYSE Rule 118.21.

[8] 15 U.S.C. 78*o*–3(b)(6).

[9] The text of the proposed rule change is available on the Commission's Web site at *http://www.sec.gov/.*

for inspection and copying at the principal office of FINRA. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–FINRA–2009–084 and should be submitted on or before December 29, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–29130 Filed 12–7–09; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61090; File No. SR–FINRA–2009–040]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change as Modified by Amendment No. 2 To Adopt FINRA Rule 2380 To Limit the Leverage Ratio Offered by Broker-Dealers for Certain Forex Transactions

December 1, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'' or ''Exchange Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on June 4, 2009, Financial Industry Regulatory Authority, Inc. (''FINRA'') (f/k/a National Association of Securities Dealers, Inc. (''NASD'')) filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been substantially prepared by FINRA. The proposal was published for comment in the **Federal Register** on July 6, 2009.[3] The Commission received 12 comments on the proposal.[4] FINRA responded to the comment letters[5] and filed Amendment No. 1 to the proposed rule change on August 27, 2009. On November 12, 2009, FINRA filed Amendment No. 2 to the proposed rule change.[6] The Commission is publishing this notice to solicit comments on the proposed rule change as modified by Amendment No. 2 from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

FINRA is proposing to adopt FINRA Rule 2380 to prohibit any member firm from permitting a customer to: (1) Initiate any forex position with a leverage ratio of greater than 4 to 1; and (2) withdraw money from an open forex position that would cause the leverage ratio for such position to be greater than 4 to 1. In addition, FINRA proposes to exempt from the proposed leverage limitation any security as defined in Section 3(a)(10) of the Securities Exchange Act of 1934.

The text of the proposed rule change is available on FINRA's Web site at *http://www.finra.org,* at the principal office of FINRA and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, FINRA included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. FINRA has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

FINRA is proposing to limit the leverage ratio offered by broker-dealers for certain forex transactions to no more than 4 to 1. Amendment No. 2 modifies the proposed leverage limitation from the original proposed rule change of 1.5 to 1 to 4 to 1, and makes conforming changes to Supplementary Material .01.[7] In addition, FINRA proposes in Amendment No. 2 to exempt from the leverage limitation any security as defined in Section 3(a)(10) of the Securities Exchange Act of 1934, by adding paragraph (b) to the proposed rule change. Finally, Amendment No. 2 to the proposed rule change redesignates original paragraph (b) as paragraph (c) with no other modifications to the definitions contained in proposed paragraph (c).

FINRA is proposing to limit the leverage ratio offered by broker-dealers for certain forex transactions to no more than 4 to 1. The proposed rule change addresses forex transactions in the off-exchange spot contract market. This market has grown in recent years following the passage of the Commodity Futures Modernization Act of 2000 (''CFMA''), which permits certain enumerated entities, including broker-dealers, to act as counterparties to a retail forex contract.[8] While most of the growth in this area has been concentrated in the futures commission merchant (''FCM'') channel, recent changes in legislation have brought greater interest to forex by broker-dealers.[9] The proposed rule change seeks to limit investor losses resulting from small changes in the exchange rate of a foreign currency and is intended to reduce the risks of excessive speculation.

Paragraph (a) of the proposed rule change states that no member shall permit a customer to initiate a forex position (as defined below) with a leverage ratio greater than 4 to 1. Thus, at the time a customer initiates a forex position, the customer must deposit at least ¼ of the notional value of the contract. Using the example in supplementary material .01, a customer entering into a forex contract representing $500,000 of a foreign currency must have an initial deposit of at least $125,000. The proposed rule change differs from the leverage limits in the FCM channel, where depending on the foreign currency selected, a customer at 400 to 1 leverage would need only an initial deposit of $1,875.

In addition, paragraph (a) also states that ''no member shall permit a customer to withdraw money from an open forex position that would cause the leverage ratio for such position to be greater than 4 to 1.'' This provision is intended to prevent a customer from depositing funds at the initiation of the forex position and then immediately withdrawing them once the position is established. If a customer were permitted to withdraw the funds once a position is established, the leverage limitation could easily be circumvented as the same deposit could be used to establish multiple forex positions.

[10] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Exchange Act Release No. 60172 (June 25, 2009), 74 FR 32022 (July 6, 2009).

[4] *See infra* note 21.

[5] Letter from Gary L. Goldsholle, Vice President and Associate General Counsel, FINRA, to Elizabeth M. Murphy, Secretary, Commission, dated August 27, 2009 (''FINRA Response'').

[6] Amendment No. 2 replaced and superseded Amendment No. 1 in its entirety.

[7] *See supra* note 3.

[8] Commodity Futures Modernization Act of 2000, Pub. L. 106–554, 114 Stat. 2763, 2763A–378 (2001).

[9] *See* CFTC Reauthorization Act of 2008, Pub. L. 110–246, 122 Stat. 1651 (2008).

The limitation on a customer's ability to withdraw funds that would cause the leverage ratio to exceed 4 to 1 differs from a maintenance margin requirement in that an adverse movement in a customer's forex contract will not necessitate the deposit of additional funds. The intra-day and day-to-day pricing changes of a forex contract may cause a customer to have a leverage ratio greater than 4 to 1. So long as a customer does not withdraw funds from those initially used to establish the position, a leverage ratio may exceed 4 to 1. FINRA considered imposing a maintenance margin requirement but determined that the level of initial deposit was sufficiently high that a maintenance margin requirement was not necessary.

The proposed rule change does not impact existing rules addressing the necessary customer funds to enter into and maintain a forex position. For example, Regulation T does not have margin requirements for forex and allows a customer to obtain nonpurpose credit in a good faith account to effect and carry transactions in forex.[10] However, it should be noted that any funds deposited in a margin account to maintain a forex position or any account equity derived from a forex position may not be used to purchase securities in that account.

Paragraph (b) of the proposed rule change exempts from the leverage limitation any security as defined in Section 3(a)(10) of the Securities Exchange Act of 1934.

Paragraph (c) of the proposed rule change establishes the key definitions. The term ''forex'' is defined to mean a foreign currency spot, forward, future, option or any other agreement, contract, or transaction in foreign currency that: (1) Is offered or entered into on a leveraged basis, or financed by the offeror, the counter party, or a person acting in concert with such person, (2) offered to or entered into with persons that are not eligible contract participants; [11] and (3) not executed on or subject to the rules of a contract market,[12] derivatives transaction execution facility,[13] national securities exchange,[14] or foreign board of trade.[15] FINRA's definition of forex is similar to the National Futures Association's (''NFA'') definition of forex [16] and to amended Section 2(c)(2) of the Commodity Exchange Act which sets forth the scope of the Commodity Futures Trading Commission's (''CFTC'') rulemaking jurisdiction.[17] The FINRA definition, however, does not contain an exclusion for certain spot and forward contracts found in the NFA and CFTC definitions, which were included due to CFTC jurisdictional limitations.[18]

Paragraph (c) also defines the term ''leverage ratio'' to mean the fraction represented by the numerator which is the notional value of a forex transaction, and the denominator, which is the amount of good faith deposit or account equity required from the customer for a forex position. For example, if the notional value of a forex contract is $250,000, and the customer deposits $200,000, the leverage ratio would be 1.25 to 1.

FINRA will announce the effective date of the proposed rule change in a *Regulatory Notice* to be published no later than 60 days following Commission approval. The effective date will be 30 days following publication of the *Regulatory Notice* announcing Commission approval.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[19] which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. FINRA believes that the proposed rule change is consistent with the provisions of the Act noted above in that it will limit leverage ratios, requiring greater initial deposits that will substantially reduce the likelihood that any small adverse percentage change in the exchange rate of a foreign currency will cause an investor's funds to be wiped out. Moreover, limiting the leverage ratios is intended to reduce the risks of excessive speculation.

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

1. Proposed Rule Change as Modified by Amendment No. 2

No written comments were either solicited or received on the proposed rule change as modified by Amendment No. 2.

2. Comments Received in Response to Original Proposed Rule Change with 1.5 to 1 Leverage Ratio

The Commission, however, solicited comment on the original proposed rule change which proposed a leverage ratio of 1.5 to 1.[20] The comment period ended on July 29, 2009. The Commission received 12 comments.[21] Commenters generally opposed the original proposed rule change.[22] Retail investors generally opposed the original proposed rule change stating that the original proposed leverage ratio of 1.5 to 1 would effectively ban participation in the forex market for most average retail traders.[23] One commenter stated that it is up to the Federal Reserve to set margin requirements.[24] Three commenters stated that the original proposed leverage limitation of 1.5 to 1 was arbitrary and is unfair to dually-registered FCM/broker-dealers.[25] One commenter suggested that dually-registered FCM/broker-dealers be exempted from the original proposed leverage limitation.[26] FINRA responded to the comments and filed Amendment

[10] 12 CFR 220.6.

[11] ''Eligible Contract Participants'' (''ECPs'') include regulated entities such as financial institutions, insurance companies, investment companies and broker-dealers. Certain corporations and individuals qualify as ECPs by meeting the requirements under the statute. *See* 7 U.S.C. 1a(12).

[12] ''Contract markets'' are markets that are designated by the CFTC that meet the criteria in Section 5 of the Commodity Exchange Act. *See* 7 U.S.C. 7.

[13] ''Derivatives transaction execution facilities'' (''DTEFs'') are CFTC-registered trading facilities that limit access primarily to institutional or otherwise eligible traders and/or limit the products traded. *See* 7 U.S.C. 7a.

[14] A ''national securities exchange'' is a securities exchange that has registered with the SEC under Section 6 of the Exchange Act. *See* 15 U.S.C. 78f.

[15] A ''foreign board of trade'' means any organized exchange or trading facility located outside of the United States.

[16] NFA By-Law 1507(b).

[17] *See* CFTC Reauthorization Act of 2008, 13101 (to be codified at 7 U.S.C. 2(c)(2)(C)(i)(I)).

[18] NFA By-Law 1507(b) and CFTC Reauthorization Act of 2008, 13101 (to be codified at 7 U.S.C. 2(c)(2)(C)(i)(II)).

[19] 15 U.S.C. 78*o*–3(b)(6).

[20] *See supra* note 3.

[21] *See* letters from Mike Andrews (February 8, 2009); Mike Andrews (February 8, 2009) (''Andrews 2''); Steve Gallagher *et al.* (February 11, 2009); Steve Gallagher (February 11, 2009); Mary M. Jackson (February 17, 2009); Aaron I. Cohn (February 21, 2009); George Selinsky (June 13, 2009); Ryan Koester (June 13, 2009); Douglas W. Schriner, CEO, Harrison Douglas, Inc. (July 20, 2009); Interactive Brokers LLC (July 27, 2009); TD AMERITRADE, Inc and thinkorswim Group Inc. (July 27, 2009) (''TD/thinkorswim''); and Futures Industry Association (July 27, 2009) (''FIA'').

[22] *Id.*

[23] Selinsky; Cohn; Gallagher *et al;* Gallagher; Jackson; Koester; Andrews; Andrews 2.

[24] Harrison Douglas.

[25] Interactive Brokers; TD/thinkorswim; FIA.

[26] Interactive Brokers.

No. 1 on August 27, 2009.[27] In its response to comments to the original proposed rule change, FINRA noted that the original proposed rule change received almost no opposition from the retail investor community, in contrast to the comments received in response to FINRA *Regulatory Notice 09–06* because FINRA believes that these investors now better understand the nature of the proposal and the scope of FINRA's jurisdiction.[28] In addition, FINRA stated that the thrust of the remaining three comment letters is to advance the pecuniary interests of dually-registered FCM/broker-dealers at the expense of investor protection.[29] In response to comments and subsequent meetings with the Commission, however, FINRA filed Amendment No. 2 to the proposed rule change on November 12, 2009 to increase the proposed leverage ratio from 1.5 to 1 to 4:1.

3. Comments Received in Response to FINRA *Regulatory Notice* 09–06 with Original Proposed 1.5 to 1 Leverage Limitation

In addition, the original proposed rule change was published for comment in FINRA *Regulatory Notice* 09–06 (January 2009). FINRA received 109 comments in response to the *Regulatory Notice.* A copy of the *Regulatory Notice* is attached as Exhibit 2a, the index to the comment letters is attached as Exhibit 2b and copies of the comment letters received in response to the *Regulatory Notice* are attached as Exhibit 2c.[30] FINRA's response to these comment letters is discussed in the Exchange Act Release No. 60172, which solicited comment on the original proposed rule change.[31]

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the proposed rule change as modified by Amendment No. 2, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–FINRA–2009–040 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–FINRA–2009–040. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of FINRA. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–FINRA–2009–040 and should be submitted on or before December 29, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[32]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–29131 Filed 12–7–09; 8:45 am]

BILLING CODE 8011–01–P

[27] *See* FINRA Response, *supra* note 5.

[28] *Id.*

[29] *Id.* FIA; Interactive Brokers; and TD/thinkorswim.

[30] All references to commenters under this Item are to the commenters as listed in Exhibit 2b to the proposed rule change [SR–FINRA–2009–040].

[31] *See supra* note 3, Section II.C of original proposed rule change.

[32] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61093; File No. SR–NASDAQ–2009–103]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Modify Fees for Members Using the NASDAQ Options Market

December 2, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 23, 2009, The NASDAQ Stock Market LLC (''NASDAQ'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by NASDAQ. Pursuant to Section 19(b)(3)(A)(ii) of the Act[3] and Rule 19b–4(f)(2) thereunder,[4] NASDAQ has designated this proposal as establishing or changing a due, fee, or other charge, which renders the proposed rule change effective upon filing. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

NASDAQ proposes to modify pricing for Nasdaq members using the NASDAQ Options Market (''NOM''), Nasdaq's facility for the trading of standardized equity and index options. Nasdaq will make the proposed rule change effective on December 1, 2009. The text of the proposed rule change is available at *http://nasdaq.cchwallstreet.com,* at NASDAQ's principal office, and at the Commission's Public Reference Room.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NASDAQ included statements concerning the purpose of and basis for the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. NASDAQ has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Nasdaq is modifying NASDAQ Rule 7050, the fee schedule for NOM. Specifically, Nasdaq is eliminating the charge of $0.05 per side per executed contract which currently applies to all orders executed in the opening cross.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[5] in general, and with Section 6(b)(4) of the Act,[6] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which Nasdaq operates or controls.

B. Self-Regulatory Organization's Statement on Burden on Competition

Nasdaq does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. To the contrary, Nasdaq notes that the options markets compete aggressively on the basis of execution price and the elimination of the charge as proposed herein is one part of Nasdaq's attempt to compete effectively.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act[7] and paragraph (f)(2) of Rule 19b–4[8] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NASDAQ–2009–103 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2009–103. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of NASDAQ. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2009–103 and should be submitted on or before December 29, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–29140 Filed 12–7–09; 8:45 am]

BILLING CODE 8011–01–P

[5] 15 U.S.C. 78f(b) (sic).

[6] 15 U.S.C. 78f(b)(5) (sic).

[7] 15 U.S.C. 78s(b)(3)(A)(ii).

[8] 17 CFR 240.19b–4(f)(2).

[9] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61094; File No. SR–CBOE–2009–090]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Temporary Membership Status and Interim Trading Permit Access Fees

December 2, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] notice is hereby given that on November 30, 2009, the Chicago Board Options Exchange, Incorporated (''CBOE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the CBOE. The Commission is publishing this notice to solicit comments on the proposed rule change from interested parties.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

CBOE proposes to adjust (i) the monthly access fee for persons granted temporary CBOE membership status (''Temporary Members'') pursuant to Interpretation and Policy .02 under CBOE Rule 3.19 (''Rule 3.19.02'') and (ii) the monthly access fee for Interim Trading Permit (''ITP'') holders under CBOE Rule 3.27. The text of the proposed rule change is available on the Exchange's Web site (*http://www.cboe.org/Legal/*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

[1] 15 U.S.C. 78s(b)(1).

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, CBOE included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The CBOE has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The current access fee for Temporary Members under Rule 3.19.02 [2] and the current access fee for ITP holders under Rule 3.27 [3] are both $11,830 per month. Both access fees are currently set at the indicative lease rate (as defined below) for November 2009. The Exchange proposes to adjust both access fees effective at the beginning of December 2009 to be equal to the indicative lease rate for December 2009 (which is $8,991). Specifically, the Exchange proposes to revise both the Temporary Member access fee and the ITP access fee to be $8,991 per month commencing on December 1, 2009.

The indicative lease rate is defined under Rule 3.27(b) as the highest clearing firm floating monthly rate [4] of the CBOE Clearing Members that assist in facilitating at least 10% of the CBOE transferable membership leases.[5] The Exchange determined the indicative lease rate for December 2009 by polling each of these Clearing Members and obtaining the clearing firm floating monthly rate designated by each of these Clearing Members for that month.

The Exchange used the same process to set the proposed Temporary Member and ITP access fees that it used to set the current Temporary Member and ITP access fees. The only difference is that the Exchange used clearing firm floating monthly rate information for the month of December 2009 to set the proposed access fees (instead of clearing firm floating monthly rate information for the month of November 2009 as was used to set the current access fees) in order to take into account changes in clearing firm floating monthly rates for the month of December 2009.

The Exchange believes that the process used to set the proposed Temporary Member access fee and the proposed Temporary Member access fee itself are appropriate for the same reasons set forth in CBOE rule filing SR–CBOE–2008–12 with respect to the original Temporary Member access fee.[6] Similarly, the Exchange believes that the process used to set the proposed ITP access fee and the proposed ITP access fee itself are appropriate for the same reasons set forth in CBOE rule filing SR–CBOE–2008–77 with respect to the original ITP access fee.[7]

Each of the proposed access fees will remain in effect until such time either that the Exchange submits a further rule filing pursuant to Section 19(b)(3)(A)(ii) of the Act [8] to modify the applicable access fee or the applicable status (*i.e.,* the Temporary Membership status or the ITP status) is terminated. Accordingly, the Exchange may, and likely will, further adjust the proposed access fees in the future if the Exchange determines that it would be appropriate to do so taking into consideration lease rates for transferable CBOE memberships prevailing at that time.

The procedural provisions of the CBOE Fee Schedule related to the assessment of each proposed access fee are not proposed to be changed and will remain the same as the current procedural provisions relating to the assessment of that access fee.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[9] in general, and furthers the objectives of Section 6(b)(4) of the Act,[10] in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among persons using its facilities.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing rule change establishes or changes a due, fee, or other charge imposed by the Exchange, it has become effective pursuant to Section 19(b)(3)(A) of the Act [11] and subparagraph (f)(2) of Rule 19b–4 [12] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–CBOE–2009–090 on the subject line.

[2] *See* Securities Exchange Act Release No. 56458 (September 18, 2007), 72 FR 54309 (September 24, 2007) (SR–CBOE–2007–107) for a description of the Temporary Membership status under Rule 3.19.02.

[3] *See* Securities Exchange Act Release No. 58178 (July 17, 2008), 73 FR 42634 (July 22, 2008) (SR–CBOE–2008–40) for a description of the Interim Trading Permits under Rule 3.27.

[4] Rule 3.27(b) defines the clearing firm floating monthly rate as the floating monthly rate that a Clearing Member designates, in connection with transferable membership leases that the Clearing Member assisted in facilitating, for leases that utilize that monthly rate.

[5] The concepts of an indicative lease rate and of a clearing firm floating month rate were previously utilized in the CBOE rule filings that set and adjusted the Temporary Member access fee. Both concepts are also codified in Rule 3.27(b) in relation to ITPs.

[6] *See* Securities Exchange Act Release No. 57293 (February 8, 2008), 73 FR 8729 (February 14, 2008) (SR–CBOE–2008–12), which established the original Temporary Member access fee, for detail regarding the rationale in support of the original Temporary Member access fee and the process used to set that fee, which is also applicable to this proposed change to the Temporary Member access fee as well.

[7] *See* Securities Exchange Act Release No. 58200 (July 21, 2008), 73 FR 43805 (July 28, 2008) (SR–CBOE–2008–77), which established the original ITP access fee, for detail regarding the rationale in support of the original ITP access fee and the process used to set that fee, which is also applicable to this proposed change to the ITP access fee as well.

[8] 15 U.S.C. 78s(b)(3)(A)(ii).

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(4).

[11] 15 U.S.C. 78s(b)(3)(A).

[12] 17 CFR 240.19b–4(f)(2).

Paper Comments

• Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2009–090. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR–CBOE–2009–090 and should be submitted on or before December 29, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–29139 Filed 12–7–09; 8:45 am]

BILLING CODE 8011–01–P

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61099; File No. SR–NYSE–2009–115]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Its Warrant Initial Listing Standard To Exempt From the Minimum Holders Requirement Any Series of Warrants That Is Listed in Connection With the Initial Firm Commitment Underwritten Public Offering of Such Warrants

December 2, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that, on November 16, 2009, New York Stock Exchange LLC (''NYSE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule changes as described in Items I and II below, which items have been prepared by the Exchange. The Exchange has designated this proposal eligible for immediate effectiveness pursuant to Rule 19b–4(f)(6)[3] under the Act. The Commission is publishing this notice to solicit comments on the proposed rule changes from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its warrant listing standard set forth in Section 703.12 of the Listed Company Manual (the ''Manual'') to exempt from the minimum holders requirement of Section 703.12 any series of warrants that is listed in connection with the initial firm commitment underwritten public offering of such warrants.

The text of the proposed rule change is available on NYSE's Web site at www.nyse.com, on the Commission's Web site at *http://www.sec.gov,* at NYSE's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The NYSE has prepared summaries, set forth in Sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The NYSE's initial listing standard for warrants set forth in Section 703.12 of the Manual requires that, at the time of initial listing, there are at least 1,000,000 warrants outstanding with at lease 400 holders and a market value of at least $4 million.

The Exchange proposes to amend Section 703.12 to exempt from the 400 holders requirement any series of warrants listed in connection with the initial firm commitment underwritten public offering of such warrants. Warrants that benefit from this exemption will still be required to meeting the 1,000,000 warrants outstanding and $4 million market value requirements of Section 703.12.

The Exchange believes that a primary purpose of distribution requirements in listing standards is to ensure a liquid trading market, promoting price discovery and the establishment of an appropriate market price for the listed securities. In the case of warrants, the Exchange believes that this liquidity concern is partially addressed by the fact that the market price for a warrant is in large part determined by the trading price of the underlying common stock. Warrant values are primarily determined using valuation models which factor in the trading price of the underlying stock, the warrant exercise price and the expiration date of the warrant.

Generally, warrants that are listed on the Exchange have either (i) been distributed to the pre-restructuring shareholders or creditors of a company in connection with its emergence from bankruptcy or (ii) were sold in an underwritten public offering as part of a unit which included warrants and common stock. In either case, the bankruptcy-related distribution or the underwritten public offering of units typically results in a significant number of holders of the warrants. The Exchange has not had any recent experience with the listing of warrants sold on a stand-alone basis in an underwritten public offering. However, the Exchange believes that the sale of warrants in an underwritten public

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 17 CFR 240.19b–4(f)(6).

offering provides an additional basis for believing that a liquid trading market will likely develop for such warrants after listing, since the offering process is designed to promote appropriate price discovery. Moreover, the underwriters in a firm commitment underwritten public offering will also generally make a market in the securities for a period of time after the offering, assisting in the creation of a liquid trading market. For the foregoing reasons, the Exchange believes that it is consistent with the protection of investors and the public interest to exempt from the holders requirement of Section 703.12 any series of warrants that is listed in connection with the initial firm commitment underwritten public offering. The Exchange notes that Nasdaq Global Market's warrant listing standard does not contain any minimum holders requirement.[4]

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b)[5] of the Act, in general, and furthers the objectives of Section 6(b)(5) of the Act,[6] in particular in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The Exchange believes that the proposed amendment is consistent with the investor protection objectives of the Act in that (i) the concern that a liquid trading market will develop for listed securities that underlies listing standard distribution requirements is partially addressed by the fact that the market price for a warrant is in large part determined by the trading price of the underlying common stock, (ii) the sale of warrants in an underwritten public offering provides an additional basis for believing that a liquid trading market will likely develop for such warrants after listing, since the offering process is designed to promote appropriate price discovery, and (iii) the underwriters in a firm commitment underwritten public offering will also generally make a market in the securities for a period of time after the offering, assisting in the creation of a liquid trading market.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[7] and Rule 19b–4(f)(6)[8] thereunder because the proposal does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) by its terms, become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest.[9]

A proposed rule change filed under Rule 19b–4(f)(6) normally may not become operative prior to 30 days after the date of filing. However, Rule 19b–4(f)(6)(iii)[10] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay period.

The Commission believes that waiver of the 30-day operative delay period is consistent with the protection of investors and the public interest. Specifically, the Commission believes that the NYSE's narrowly crafted proposal, that exempts from the 400 holders requirement only those warrants that are issued through an initial firm commitment underwritten public offering, helps to address the liquidity and price discovery concerns that underlie the minimum holder requirement. The Commission notes that the underwriters in an initial firm commitment public offering in such warrants would generally make a market for a period of time after the offering, thereby alleviating short term liquidity concerns. Moreover, as noted by the NYSE, the price of such warrants would be established by the firm commitment underwritten offering process, in addition to the price of the underlying security, the exercise price of the warrants, and the expiration of the warrants. Finally, the Commission notes that these warrants would have to meet all the other requirements under NYSE's Listed Company Manual Section 703.12, which includes minimum aggregate market value and size requirements. For these reasons, the Commission believes it is consistent with the protection of investors and the public interest to waive the 30-day operative delay and the proposal is effective upon filing.[11]

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such proposed rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.[12]

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NYSE–2009–115 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSE–2009–115. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the

[4] *See* Nasdaq Marketplace Rule 5410.

[5] 15 U.S.C. 78f(b)

[6] 15 U.S.C. 78f(b)(5)

[7] 15 U.S.C. 78s(b)(3)(A).

[8] 17 CFR 240.19b–4(f)(6).

[9] The Exchange has given the Commission notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change.

[10] 17 CFR 240.19b–4(f)(6)(iii).

[11] For purposes only of waiving the operative delay for this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[12] 15 U.S.C. 78s(b)(3)(C).

submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2009–115 and should be submitted on or before December 29, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–29138 Filed 12–7–09; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61086; File No. SR–ISE–2009–103]

Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing of Proposed Rule Change Relating to Market Data Fees

December 1, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 25, 2009, the International Securities Exchange, LLC (the ''Exchange'' or the ''ISE'') filed with the Securities and Exchange Commission the proposed rule change as described in Items I, II, and III below, which items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The ISE is proposing to amend its Schedule of Fees to (1) increase the annual subscription rate for the ISE Open/Close Trade Profile, (2) adopt subscription fees for the sale of three new market data offerings, all of which are based on the ISE Open/Close Trade Profile, and (3) increase the annual subscription and ad-hoc request rates for ISE's Historical Options Tick Data. The text of the proposed rule change is available on the Exchange's Web site (*http://www.ise.com*), at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

ISE proposes to amend its Schedule of Fees to (1) increase the annual subscription rate for the ISE Open/Close Trade Profile, (2) adopt subscription fees for the sale of three new market data offerings, all of which are based on the ISE Open/Close Trade Profile, and (3) increase the annual subscription and ad-hoc request rates for ISE's Historical Options Tick Data. These proposed fee changes will be operative on January 4, 2010.

ISE Open/Close Trade Profile

ISE currently sells a market data offering comprised of the entire opening and closing trade data of ISE listed options of both customers and firms, referred to by the Exchange as the ISE Open/Close Trade Profile.[3] The ISE Open/Close Trade Profile offering is subdivided by origin code (*i.e.,* customer or firm) and the customer data is then further subdivided by order size. The volume data is summarized by day and series (*i.e.,* symbol, expiration date, strike price, call or put). The ISE Open/Close Trade Profile enables subscribers to create their own proprietary put/call calculations. The data is compiled and formatted by ISE as an end of day file. This market data offering is currently available to both members and non-members on annual [sic] subscription basis. The current subscription rate for both members and non-members is $600 per month. Over the course of the last two years, ISE has added numerous additional fields to this offering. As a result, ISE's costs of gathering and storing the voluminous data underlying the ISE Open/Close Trade Profile have increased. As a result, ISE proposes to increase the subscription rate for both members and non-members to $750 per month, effective January 1, 2010. [sic][4]

ISE also sells historical ISE Open/Close Trade Profile, a market data offering comprised of the entire opening and closing trade data of both customers and firms that dates back to May 2005, to both members and non-members, on an ad-hoc basis or as a complete set that dates back to May 2005. Ad-hoc subscribers can purchase this data for any number of months, beginning from May 2005 through the current month. Alternatively, subscribers can purchase the entire set of this data, beginning from May 2005 through the current month. The historical ISE Open/Close Trade Profile is compiled and formatted by ISE and sold as a zipped file. ISE charges ad-hoc subscribers $600 per request for each month of data and a discounted fee of $500 per request per month for subscribers that want the complete set, *i.e.,* from May 2005 to the present month. ISE is not proposing any changes to the fee for historical ISE Open/Close Trade Profile.

ISE Open/Close Trade Profile Intraday

The Exchange now proposes to expand its suite of ISE Open/Close Trade Profile market data offerings with three new products.

1. ISE Open/Close Trade Profile Intraday

The ISE Open/Close Trade Profile Intraday offering uses the same process as that used for the ISE Open/Close Trade Profile. The ISE Open/Close Trade Profile Intraday has the same trade-related fields contained in the ISE Open/Close Trade Profile. The ISE

[13] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 56254 (August 15, 2007), 72 FR 47104 (August 22, 2007) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to ISE Open/Close Trade Profile Fees) (SR–ISE–2007–70).

[4] ISE intends to implement the new fees on January 4, 2010. *See supra* the first paragraph of Section II.A.1.

Open/Close Trade Profile Intraday file contains data that is updated at 10-minute intervals throughout the trading day. ISE proposes to charge both members and non-members $2,000 per month on an annual subscription basis.

2. Historical ISE Open/Close Trade Profile Intraday

The Historical ISE Open/Close Trade Profile Intraday offering is a compilation of the ISE Open/Close Trade Profile Intraday files. The Exchange has received numerous requests for this type of data, especially from proprietary trading firms and hedge funds that use this type of data for their quantitative models. ISE proposes to sell Historical ISE Open/Close Trade Profile Intraday on an ad-hoc basis. An ad-hoc request can be for any number of months, quarters or years for which the data is available. Members and non-members will be able to purchase this data by paying a one-time fee of $1,000 per month, $2,000 per quarter or $8,000 per year. For example, a subscriber that wants to purchase data for August 2009 will pay $1,000; a subscriber that wants to purchase data for July, August and September of 2009 will pay $2,000; a subscriber that wants to purchase data for all twelve months of 2009 will pay $8,000.

3. ISE Open/Close Trade Profile and ISE Open/Close Trade Profile Intraday

As noted above, the Exchange already sells the ISE Open/Close Trade Profile end of day data. The Exchange believes that current subscribers to the ISE Open/Close Trade Profile are likely to subscribe to the ISE Open/Close Trade Profile Intraday offering. However, to further incentivize current subscribers of ISE Open/Close Trade Profile to also subscribe to the ISE Open/Close Trade Profile Intraday offering, the Exchange proposes to offer a discounted subscription rate. Subscribers to both the ISE Open/Close Trade Profile and the ISE Open/Close Trade Profile Intraday will pay an annual subscription rate of $2,500.[5]

All of the ISE Open/Close Trade Profile market data offerings, including the new products proposed herein are compiled and formatted by ISE and sold as a zipped file.

Historical Options Tick Data

ISE currently creates market data that consists of options quotes and orders that are generated by our members and all trades that are executed on the Exchange. ISE also produces a Best Bid/Offer, or BBO, with the aggregate size from all outstanding quotes and orders at the top price level, or the ''top of the book.'' This data is formatted according to Options Price Reporting Authority (''OPRA'') specification and sent to OPRA for redistribution. OPRA processes ISE data along with the same data sets from the other six options exchanges and creates a National BBO, or ''NBBO,'' from all seven options exchanges.

ISE also captures the OPRA tick data[6] and makes it available as an ''end of day'' file[7] or as a ''historical'' file[8] for ISE members and non-ISE members alike. ISE has data available from June 2005 through the present month. ISE currently charges all subscribers of Historical Options Tick Data $1,500 per month per firm on an annual subscription basis. For ad-hoc requests, ISE charges $85 per day, with a minimum order size of $1,000 plus a processing fee to pay for hard drives and shipping. ISE also currently charges a processing fee of $499 per order for up to 400 Giga Bytes (GB). An order that exceeds 400 GB is currently charged an additional $399 for up to another 400 GB.[9]

The Exchange now proposes to increase the annual subscription rate to $2,000 per month per firm. For ad-hoc requests, the Exchange proposes to increase the rate to $120 per day. The minimum order size of $1,000 will remain unchanged as will the processing fees of $499 and $399. As the size of the data has increased since the Exchange first introduced this product, the Exchange is also increasing the size allowance for ad-hoc requests from 400 Giga Bytes to 1.5 Terabytes (TB). Pursuant to this proposed rule change, for ad-hoc requests, the Exchange will charge a processing fee of $499 per order for up to 1.5 TB. An order that exceeds 1.5 TB will be charged an additional $399 for up to another 1.5 TB. These fee changes will be made effective by the Exchange on January 1, 2010. [sic][10]

The Exchange's market research indicates that OPRA tick data is primarily used by market participants in the financial services industry for back-testing trading models, post-trade analysis, compliance purposes and analyzing time and sales information. This market data offering provides both ISE members and non-members with a choice to subscribe to a service that provides a daily file on an on-going basis (end of day file), or simply request data on an ad-hoc basis for a pre-determined date range (historical file).

2. Statutory Basis

The basis under the Securities Exchange Act of 1934 (the ''Exchange Act'') for this proposed rule change is the requirement under Section 6(b)(4), that an exchange have an equitable allocation of reasonable dues, fees and other charges among its members and other persons using its facilities. The Exchange believes introduction of the new products, all of which are based on the ISE Open/Close Trade Profile, will provide market participants with an opportunity to obtain additional data in furtherance of their investment decisions. The ISE Open/Close Trade Profile and the Historical Options Tick Data offerings, which have been available for a number of years, have provided subscribers with valuable market data since they were first introduced. The Exchange has made numerous enhancements to both these market data offerings and believes the proposed fee change is reasonable and equitable in that the fee increase is nominal in light of the increased costs borne by the Exchange for the enhancements.

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[11] in general, and with Sections 6(b)(4) of the Act,[12] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which ISE operates or controls.

The Exchange believes that the proposed rule change is also consistent

[5] The Commission notes that this proposed annual subscription rate would be $2,500 per month (*see* Exhibit 5 to the Form 19b–4).

[6] The Exchange collects this data throughout each trading day and at the end of each trading day, the Exchange compresses the data and uploads it onto a server. Once the data is loaded onto the server, it is then made available to subscribers.

[7] An end of day file refers to OPRA tick data for a trading day that is distributed prior to the opening of the next trading day. An end of day file is made available to subscribers as soon as practicable at the end of each trading day on an on-going basis pursuant to an annual subscription or through an ad-hoc request.

[8] An end of day file that is distributed after the start of the next trading day is called a historical file. A historical file is available to customers for a pre-determined date range by ad-hoc requests only.

[9] *See* Securities Exchange Act Release Nos. 53212 (February 2, 2006), 71 FR 6803 (February 9, 2006) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change Establishing Fees for Historical Options Tick Market Data) (SR–ISE–2006–07); and 53390 (February 28, 2006), 71 FR 11457 (March 7, 2006) (Order Granting Accelerated Approval of a Proposed Rule Change Establishing Fees for Historical Options Tick Market Data for Non-Members) (SR–ISE–2006–08).

[10] ISE plans to implement the new fees on January 4, 2010. *See supra* the first paragraph of Section II.A.1.

[11] 15 U.S.C. 78f.

[12] 15 U.S.C. 78f(b)(4).

with the provisions of Section 6(b)(5) of the Act,[13] in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers, or to regulate by virtue of any authority conferred by the Act matters not related to the purposes of the Act or the administration of the Exchange.

The Exchange believes that the proposed rule change is also consistent with Section 6(b)(8) of the Act [14] in that it does not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act, as set forth in more detail below.

In adopting Regulation NMS, the Commission granted self-regulatory organizations and broker-dealers increased authority and flexibility to offer new and unique market data to the public. It was believed that this authority would expand the amount of data available to consumers, and also spur innovation and competition for the provision of market data.

The Commission has recently issued an order firmly establishing that in reviewing non-core data products such as the ISE Open/Close Trade Profile, the ISE Open/Close Trade Profile Intraday and ISE's Historical Options Tick Data, the Commission will utilize a market-based approach that relies primarily on competitive forces to determine the terms on which non-core data is made available to investors.[15] The Commission adopted a two-part test:

> The first is to ask whether the exchange was subject to significant competitive forces in setting the terms of its proposal for non-core data, including the level of any fees. If an exchange was subject to significant competitive forces in setting the terms of a proposal, the Commission will approve the proposal unless it determines that there is a substantial countervailing basis to find that the terms nevertheless fail to meet an applicable requirement of the Exchange Act or the rules thereunder. If, however, the exchange was not subject to significant competitive forces in setting the terms of a proposal for non-core data, the Commission will require the exchange to provide a substantial basis, other than competitive forces, in its proposed rule change demonstrating that the terms of the proposal are equitable, fair, reasonable, and not unreasonably discriminatory.[16]

This standard begins from the premise that no Commission rule requires exchanges or market participants either to distribute non-core data to the public or to display non-core data to investors.[17]

In its NetCoalition Order the Commission concluded that ''at least two broad types of significant competitive forces applied to NYSE Arca in setting the terms of its proposal to distribute the ArcaBook data: (1) NYSE Arca's compelling need to attract order flow from market participants; and (2) the availability to market participants of alternatives to purchasing the ArcaBook data. The Commission conducted an exhaustive 14-page review of these two competitive forces before concluding that the availability of alternatives, as well as the compelling need to attract order flow, imposed significant competitive pressure on that exchange's need to act equitably, fairly, and reasonably in setting the terms of the fees for its non-core data product.[18]

The market data provided in the ISE Open/Close Trade Profile, the ISE Open/Close Trade Profile Intraday and ISE's Historical Options Tick Data is non-core data that is governed by the same analysis the Commission set forth in the NetCoalition Order. As with the NYSE Arca depth-of-book product, no rule requires ISE or any other exchange to offer this data; nor are vendors required to purchase or display this data.

Additionally, ISE is constrained by the same two competitive forces in the options market as the Commission found were present in the NetCoalition Order. First, ISE has a compelling need to attract order flow from market participants in order to maintain its share of trading volume. This compelling need to attract order flow imposes significant pressure on ISE to act reasonably in setting the fees for its market data offerings, particularly given that the market participants that will pay such fees often will be the same market participants from whom ISE must attract order flow. These market participants include broker-dealers that control the handling of a large volume of customer and proprietary order flow. Given the portability of order flow from one exchange to another, any exchange that sought to charge unreasonably high market data fees would risk alienating many of the same customers on whose orders it depends for competitive survival.

Second, the Exchange is constrained in pricing the ISE Open/Close Trade Profile, the ISE Open/Close Trade Profile Intraday and Historical Options Tick Data by the availability to market participants of alternatives to purchasing ISE's market data offerings. ISE must consider the extent to which market participants would choose one or more alternatives instead of purchasing the exchange's data. For example, although ISE's Historical Options Tick Data is separate from the core data feed available by the Options Price Reporting Authority (''OPRA''), all the information available in this market data offering are included in the core data feed. The core OPRA data is widely distributed, thus constraining ISE's ability to price its market data offerings. Additionally, the CBOE, which enjoys greater market share than ISE, is also a potential competitor as it too sells an open/close market data offering that market participants may choose to purchase instead.

In the aftermath of the NetCoalition Order, the Exchange believes that the competition among exchanges for order flow and the competition among exchanges for market data products subject ISE's proposed market data offerings to significant competitive forces. In addition, the Exchange believes that no substantial countervailing basis exists to support a finding that the proposed fees fail to meet the requirement of the Act. In sum, the availability of alternative sources of information imposes significant competitive pressures on the ISE Open/Close Trade Profile, the ISE Open/Close Trade Profile Intraday and ISE's Historical Options Tick Data and ISE's compelling need to attract order flow imposes significant competitive pressure on the Exchange to act equitably, fairly, and reasonably in setting its fees.

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

[13] 15 U.S.C. 78f(b)(5).

[14] 15 U.S.C. 78f(b)(8).

[15] Securities Exchange Act Release No. 57917 (Dec. 2, 2008) (''NetCoalition Order'' resolving File No. SRNYSEArca–2006–21).

[16] *Id.* at 48–49.

[17] *Id.* at 4.

[18] *Id.* at 51—65. The Commission then spent an additional 36 pages (65–101) analyzing and refuting comments challenging the Commission's competition analysis.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(a) By order approve such proposed rule change; or

(b) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File No. SR–ISE–2009–103 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–ISE–2009–103. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–ISE–2009–103 and should be submitted on or before December 29, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–29137 Filed 12–7–09; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61095; File No. SR–Phlx–2009–99]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by NASDAQ OMX PHLX, Inc. Regarding the Obligations of Streaming Quote Traders

December 2, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 [2] thereunder, notice is hereby given that on November 25, 2009, NASDAQ OMX PHLX, Inc. (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing with the Commission a proposal to amend its Rule 1014 (Obligations and Restrictions Applicable to Specialists and Registered Options Traders) to indicate that certain market makers on the Exchange, specifically Streaming Quote Traders, Remote Streaming Quote Traders, Directed Streaming Quote Traders, and Directed Remote Streaming Quote Traders, will be deemed not to be assigned in Quarterly Option Series and adjusted option series.

The text of the proposed rule change is available on the Exchange's Web site at *http://nasdaqomxphlx.cchwallstreet.com/NASDAQOMXPHLX/Filings/*, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposal is to amend Rule 1014 to indicate that certain market makers on the Exchange, specifically Streaming Quote Traders, Remote Streaming Quote Traders, Directed Streaming Quote Traders, and Directed Remote Streaming Quote Traders, will [sic] deemed not to be assigned in Quarterly Option Series and adjusted option series; and to propose a definition of adjusted options series.

Rule 1014 discusses the obligations and restrictions that are applicable to specialists and Registered Option Traders (''ROTs''). ROTs are market makers on the Exchange that include Streaming Quote Traders (''SQTs'');[3]

[19] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] An SQT is an ROT who has received permission from the Exchange to generate and submit option quotations electronically in eligible options to which such SQT is assigned. An SQT may only submit such quotations while such SQT is physically present on the floor of the Exchange. *See* Rule 1014(b)(ii)(A). *See also* Securities Exchange Act Release No. 59995 (May 28, 2009), 74 FR 26750 (June 3, 2009) (SR–Phlx–2009–32) (approval order regarding enhancements to opening, linkage and

Remote Streaming Quote Traders (''RSQTs'');[4] and Directed Streaming Quote Traders (''DSQTs'') and Directed Remote Streaming Quote Traders[5] (''DRSQTs'') (together the ''Streaming Quote Traders''). Rule 1014 states that, in addition to other requirements, on a daily basis Streaming Quote Traders are responsible to quote two-sided markets in not less than a specified percentage of options assigned by the Exchange at the request of such Streaming Quote Traders, unless specifically exempted from such quoting responsibility.[6] This exemption from quoting responsibilities, which is in Rule 1014(b)(ii)(D)(4), currently states that Streaming Quote Traders are deemed not to be assigned, and as such do not have quoting responsibilities, in options series with an expiration of nine months or greater (the ''Exemption'').

The Exchange hereby proposes to amend the Exemption. Specifically, the Exchange proposes to incorporate into the Exemption two additional types of options series: Quarterly Option Series[7] and adjusted option series.[8] As a result, Streaming Quote Traders would not be assigned in and would not have quoting obligations in respect of options that are longer that [sic] nine months in length, Quarterly Option Series, and adjusted option series.

The Exchange has recently noticed a reduction in liquidity in certain options classes that include adjusted option series and Quarterly Options Series, emanating from withdrawals from assignments in these classes. Streaming Quote Traders that have withdrawn from assignments in these classes have informed the Exchange that the withdrawals were based in part on the obligation to continuously quote adjusted options series and Quarterly Option Series, whereby the quoting obligations on these often less frequently traded option series impacted the risk parameters acceptable to the Streaming Quote Traders. By withdrawing from assignments, liquidity (as well as volume) has been negatively impacted in the affected options classes listed on the Exchange. The Exchange believes that its rule change proposal will ameliorate the liquidity impact by allowing Streaming Quote Traders to continue assignment in option classes.[9]

The Exchange believes that the proposed rule change should incentivize Streaming Quote Traders to continue assignments and thereby expand liquidity in options classes listed on the Exchange to the benefit of the Exchange and its members and public customers.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act[10] in general, and furthers the objectives of Section 6(b)(5) of the Act[11] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanisms of a free and open market and a national market system. The Exchange believes that the proposal to exempt Quarterly Option Series and adjusted option series from assignments will enhance liquidity in assigned option classes.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange believes that the foregoing proposed rule change may take effect upon filing with the Commission pursuant to Section 19(b)(3)(A)[12] of the Act and Rule 19b–4(f)(6)(iii) thereunder,[13] because the foregoing proposed rule change does not: (1) Significantly affect the protection of investors or the public interest; (2) impose any significant burden on competition; and (3) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate.[14]

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

routing, quoting, and order management processes in the Exchange's electronic options order entry, trading, and execution system PHLX XL II).

[4] An RSQT is an ROT that is a member or member organization with no physical trading floor presence who has received permission from the Exchange to generate and submit option quotations electronically in eligible options to which such RSQT has been assigned. An RSQT may only submit such quotations electronically from off the floor of the Exchange. *See* Rule 1014(b)(ii)(B).

[5] A DSQT is an SQT and a DRSQT is an RSQT that receives a Directed Order. Exchange Rule 1080(l)(i)(A) defines Directed Order as any customer order (other than a stop or stop-limit order as defined in Rule 1066) to buy or sell which has been directed to a particular specialist, RSQT, or SQT by an Order Flow Provider and delivered to the Exchange via its electronic quoting, execution and trading system.

[6] Rule 1014(b)(ii)(D) states in part: (1) In addition to the other requirements for ROTs set forth in this Rule 1014, except as provided in sub-paragraph (4) below, an SQT and an RSQT shall be responsible to quote two-sided markets in not less than 60% of the series in which such SQT or RSQT is assigned, provided that, on any given day, a Directed SQT (''DSQT'') or a Directed RSQT (''DRSQT'') (as defined in Rule 1080(l)(i)(C)) shall be responsible to quote two-sided markets in the lesser of 99% of the series listed on the Exchange or 100% of the series listed on the Exchange minus one call-put pair, in each case in at least 60% of the options in which such DSQT or DRSQT is assigned. Whenever a DSQT or DRSQT enters a quotation in an option in which such DSQT or DRSQT is assigned, such DSQT or DRSQT must maintain until the close of that trading day quotations for the lesser of 99% of the series of the option listed on the Exchange or 100% of the series of the option listed on the Exchange minus one call-put pair.

[7] Quarterly Options Series (''QOS'') are series in an options class that is approved for listing and trading on the Exchange in which the series is opened for trading on any business day and expires at the close of business on the last business day of a calendar quarter. *See* Rule 1000(b)43. QOS are traded pursuant to the QOS Program set forth in Commentary .08 to Rule 1012 and Rule 1101A(b)(v).

[8] For purposes of the Exemption, an adjusted option series is defined as an option series wherein one option contract in the series represents the delivery of other than 100 shares of underlying stock or Exchange-Traded Fund Shares. *See* Rule 1014(b)(ii)(D)(4).

[9] In that Streaming Quote Traders would not be deemed to be assigned in QOS and adjusted options series, they also would not enjoy any benefits stemming from being assigned in these series.

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(5).

[12] 15 U.S.C. 78s(b)(3)(A).

[13] 17 CFR 240.19b-4(f)(6).

[14] 17 CFR 240.19b-4(f)(6)(iii). In addition, Rule 19b-4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change along with a brief description and the text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

Electronic Comments

• Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or

• Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–Phlx 2009–99 on the subject line.

Paper Comments

• Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–Phlx-2009–99. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–Phlx 2009–99 and should be submitted on or before December 29, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–29204 Filed 12–7–09; 8:45 am]

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[15] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61097; File No. SR–BATS–2009–031]

Self-Regulatory Organizations; BATS Exchange, Inc.; Notice of Filing of Proposed Rule Change To Establish Rules Governing the Trading of Options on the BATS Options Exchange

December 2, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 10, 2009, BATS Exchange, Inc. (''Exchange'' or ''BATS'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change to adopt rules to govern the trading of options on the Exchange (referred to herein as ''BATS Options Exchange'' or ''BATS Options'') as described in Items I, II, and III below, which Items have been prepared by the Exchange (the ''Trading Rules Proposal''). The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to adopt rules to govern the trading of options on the Exchange. The Exchange represents that the BATS Options Exchange will operate a fully automated, price/time priority execution system built on the core functionality of the Exchange's approved equities platform, meaning that the Exchange will operate its options market much as it operates its cash equities market today.

The text of the proposed rule change is available at the Exchange's Web site at *http://www.batstrading.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room. The text of Exhibit 5 of the proposed rule change is also available on the Commission's Web site at *http://www.sec.gov/rules/sro.shtml.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange is proposing to adopt a series of rules in connection with BATS Options, which will be a facility of the Exchange. BATS Options will operate an electronic trading system developed to trade options (''System'') that will provide for the electronic display and execution of orders in price/time priority without regard to the status of the entities that are entering orders. All Exchange Members will be eligible to participate in BATS Options provided that the Exchange specifically authorizes them to trade in the System. The System will provide a routing service for orders when trading interest is not present on BATS Options, and will comply with the obligations of the Options Order Protection and Locked/Crossed Market Plan.

BATS Options Members

The Exchange will authorize any Exchange Member who meets certain enumerated qualification requirements to obtain access to BATS Options (any such Member, an ''Options Member'').

There will be two types of Options Members, Options Order Entry Firms (''OEFs'') and Options Market Makers. OEFs will be those Options Members representing orders as agent on BATS Options and non-market maker participants conducting proprietary trading as principal. Options Market Makers are Options Members registered with the Exchange as Options Market Makers and registered with BATS Options in an options series listed on BATS Options. To become an Options Market Maker, an Options Member is required to register by filing a written application. Such registration will consist of at least one series and may include all series traded on the Exchange. The Exchange will not place any limit on the number of entities that may become Options Market Makers.

The Exchange will not list an options series for trading unless at least one Options Market Maker is registered in the options series. In addition, before the Exchange opens trading for any additional series of an options class, it would require at least one Options

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

Market Maker to be registered for trading that particular series.

BATS Options Market Makers will be required to electronically engage in a course of dealing to enhance liquidity available on BATS Options and to assist in the maintenance of fair and orderly markets. Among other things, an Options Market Maker would have to satisfy the following responsibilities and duties during trading: (1) On a daily basis maintain a two-sided market on a continuous basis in at least 75% of the options series in which it is registered; (2) enter a size of at least one contract for its best bid and its best offer; and (3) maintain minimum net capital in accordance with Commission and the Exchange rules. Substantial or continued failure by an Options Market Maker to meet any of its obligations and duties, will subject the Options Market Maker to disciplinary action, suspension, or revocation of the Options Market Maker's registration in one or more options series.

Options Market Makers receive certain benefits for carrying out their duties. For example, a lender may extend credit to a broker-dealer without regard to the restrictions in Regulation T of the Board of Governors of the Federal Reserve System if the credit is to be used to finance the broker-dealer's activities as a specialist or market maker on a national securities exchange. Thus, an Options Market Maker has a corresponding obligation to hold itself out as willing to buy and sell options for its own account on a regular or continuous basis to justify this favorable treatment.[3]

Every Options Member shall at all times maintain membership in another registered options exchange that is not registered solely under Section 6(g) of the Securities Exchange Act of 1934 or in FINRA. OEF's that transact business with customers must at all times be members of FINRA. Pursuant to proposed BATS Rule 17.2(g), every Options Member will be required to have at least one registered Options Principal who satisfies the criteria of that Rule, including the satisfaction of a proper qualification examination. An OEF may only transact business with Public Customers if such Options Member also is an Options Member of another registered national securities exchange or association with which the Exchange has entered into an agreement under Rule 17d–2 under the Exchange Act pursuant to which such other exchange or association shall be the designated options examining authority for the OEF.

As provided in BATS Rule 16.2, existing Exchange Rules applicable to the BATS equity market contained in Chapters I through XV of the Exchange Rules will apply to Options Members unless a specific Exchange Rule applicable to the options market (Chapters XVI through XXIX of the Exchange Rules) governs or unless the context otherwise requires. Options Members can therefore provide sponsored access to the BATS Options Exchange to a nonmember (''Sponsored Participant'') pursuant to Rule 11.3 of the Exchange Rules.

Execution System

The Exchange's options trading system will leverage the Exchange's current state of the art technology, including its customer connectivity, messaging protocols, quotation and execution engine, order router, data feeds, and network infrastructure. This approach minimizes the technical effort required for existing Exchange Members to begin trading options on the BATS Options Exchange. As a result, the BATS Options Exchange will closely resemble the Exchange's equities market, but will differ from most existing options exchanges by, most prominently, offering true price/time priority across all participants rather than differentiating between participant/trading interest.

Like the Exchange system for equities, all trading interest entered into the System will be automatically executable. Orders entered into the System will be displayed anonymously. The System will offer fully anonymous trading, however, options trades are not currently anonymous through settlement. The Exchange will become an exchange member of the Options Clearing Corporation (''OCC''). The System will be linked to OCC for the Exchange to transmit locked-in trades for clearance and settlement.

Hours of Operation. The options trading system will operate between the hours of 9:30 a.m. Eastern Time and 4 p.m. Eastern Time, with all orders being available for execution during that time frame.

Minimum Quotation and Trading Increments. The Exchange is proposing to apply the following quotation increments: (1) If the options series is trading at less than $3.00, five (5) cents; (2) if the options series is trading at $3.00 or higher, ten (10) cents; and (3) if the options series is trading pursuant to the Penny Pilot program one (1) cent if the options series is trading at less than $3.00, five (5) cents if the options series is trading at $3.00 or higher, except for QQQQs where the minimum quoting increment will be one cent for all series. In addition, the Exchange is proposing that the minimum trading increment for options contracts traded on BATS Options will be one (1) cent for all series.

Penny Pilot Program. Upon initial operation of BATS Options the Exchange proposes to commence trading, pursuant to the Penny Pilot Program (the ''Penny Pilot''), all classes that are, on that date, traded by other options exchanges pursuant to the Penny Pilot, which is scheduled to expire on December 31, 2010. Following the commencement of operations and trading of classes traded by other options exchanges pursuant to the Penny Pilot at that time, the Exchange proposes to expand the classes subject to the Penny Pilot on a quarterly basis, 75 classes at a time through August 2010. For instance, if BATS Options commences operations on February 16, 2010, then the Exchange will trade all classes trading pursuant to the Penny Pilot on other options exchanges as of that date and will add 75 classes in May 2010 and 75 additional classes in August 2010. In order to reduce operational confusion and provide for appropriate time to update databases, the Exchange proposes to add the eligible issues to the Penny Pilot effective for trading on the Monday ten days after Expiration Friday. Thus, as applicable, the quarterly additions would be effective on February 1, 2010; May 3, 2010; and August 2, 2010. For purposes of identifying the issues to be added per quarter, the Exchange shall use data from the prior six calendar months preceding the implementation month, except that the month immediately preceding their addition to the Penny Pilot would not be utilized for purposes of the analysis. The new classes added by the Exchange on a quarterly basis will represent the 75 most actively traded multiply listed options classes based on national average daily volume for the six months prior to selection, closing under $200 per share on the Expiration Friday prior to expansion, except that the month immediately preceding their addition to the Penny Pilot will not be used for the purpose of the six month analysis.[4] The Exchange will specify which options trade in the Penny Pilot, and in what increments, in Information Circulars filed with the Commission pursuant to

[3] Boston Options Exchange (''BOX'') and the NASDAQ Options Market (''NOM'') have market maker obligations comparable to those proposed for BATS Options.

[4] Index products would be included in the expansion if the underlying index level was under 200.

Rule 19b–4 under the Exchange Act and distributed to Members. The Exchange represents that it has the necessary system capacity to support any additional series listed as part of the Penny Pilot.

The Exchange agrees to submit semi-annual reports to the Commission that will include sample data and written analysis of information collected from April 1 through September 30, and from October 1 through March 31, for each year, for first the 63 classes traded pursuant to the Penny Pilot by other options exchanges (the ''Initial Classes''), and the ten most active and twenty least active options classes added to the Penny Pilot with each quarterly expansion, commencing with the expansion that occurred on November 2, 2009. As the Penny Pilot matures and expands, the Exchange believes that this proposed sampling approach provides an appropriate means by which to monitor and assess the Penny Pilot's impact. The Exchange will also identify, for comparison purposes, a control group consisting of the ten least active options classes from the Initial Classes. This report will include, but is not limited to: (1) Data and written analysis on the number of quotations generated for options included in the report; (2) an assessment of the quotation spreads for the options included in the report; (3) an assessment of the impact of the Penny Pilot on the capacity of the Exchange's automated systems; (4) data reflecting the size and depth of markets; and (5) any capacity problems or other problems that arose related to the operation of the Penny Pilot and how the Exchange addressed them.

Additionally, the Exchange proposes that any Penny Pilot issues that have been delisted may be replaced on a semi-annual basis by the next most actively traded multiply listed options classes that are not yet included in the Penny Pilot, based on trading activity in the previous six months. The replacement issues, as applicable, would be added to the Penny Pilot Program on the second trading day following January 1, 2010 and July 1, 2010. The Exchange will employ the same parameters to prospective replacement issues as approved and applicable under the Penny Pilot Program, including excluding high-priced underlying securities. The replacement issues will be announced in Information Circulars distributed to Members.

Order Types. The proposed System will make available to Options Members Reserve Orders, Limit Orders, Minimum Quantity Orders, Discretionary Orders, Market Orders, Price Improving Orders, Destination Specific Orders, BATS Only Orders, BATS Post Only Orders, Partial Post Only at Limit Orders, Intermarket Sweep Orders, and Directed Intermarket Sweep Orders, with characteristics and functionality similar to what is currently approved for use in the Exchange's equities trading facility or on other options exchanges.

''Reserve Orders'' are limit orders that have both a displayed size as well as an additional non-displayed amount. Both the displayed and non-displayed portions of the Reserve Order are available for potential execution against incoming orders. If the displayed portion of a Reserve Order is fully executed, the System will replenish the display portion from reserve up to the size of the original display amount. A new timestamp is created for the replenished portion of the order each time it is replenished from reserve, while the reserve portion retains the timestamp of its original entry.

''Limit Orders'' are orders to buy or sell an option at a specified price or better. A limit order is marketable when, for a limit order to buy, at the time it is entered into the System, the order is priced at the current inside offer or higher, or for a limit order to sell, at the time it is entered into the System, the order is priced at the inside bid or lower.

''Minimum Quantity Orders'' are orders that require that a specified minimum quantity of contracts be obtained, or the order is cancelled. Minimum Quantity Orders may only be entered with a time-in-force designation of Immediate or Cancel.

''Discretionary Orders'' are orders that have a displayed price and size, as well as a non-displayed discretionary price range, at which the entering party, if necessary, is also willing to buy or sell. The non-displayed trading interest is not entered into the BATS Options Book but is, along with the displayed size, converted to an IOC buy (sell) order priced at the highest (lowest) price in the discretionary price range when displayed contracts become available on the opposite side of the market or an execution takes place at any price within the discretionary price range. The generation of this IOC order is triggered by the automatic cancellation of the displayed contracts portion of the Discretionary Order. If more than one Discretionary Order is available for conversion to an IOC order, the System will convert and process all such orders in the same priority in which such Discretionary Orders were entered. If an IOC order is not executed in full, the unexecuted portion of the order is automatically re-posted and displayed in the BATS Options Book with a new time stamp, at its original displayed price, and with its non-displayed discretionary price range.

''Market Orders'' are orders to buy or sell at the best price available at the time of execution.

''Price Improving Orders'' are orders to buy or sell an option at a specified price at an increment smaller than the minimum price variation in the security. Price Improving Orders may be entered in increments as small as (1) one cent. Price Improving Orders that are available for display shall be displayed at the minimum price variation in that security and shall be rounded up for sell orders and rounded down for buy orders. Unless a User has entered instructions not to do so, Price Improving Orders will be subject to the ''displayed price sliding process.'' Pursuant to the displayed price sliding process, a Price Improving Order that after rounding to the minimum price variation, or any other order to be displayed on the BATS Book that at the time of entry, would lock or cross a Protected Quotation (collectively, ''the original locking price''): (A) Such order will be displayed by the System at one minimum price variation below the current NBO (for bids) or to one minimum price variation above the current NBB (for offers); and (B) in the event the NBBO changes such that the order at the original locking price would not lock or cross a Protected Quotation, the order will receive a new timestamp, and will be displayed at the original locking price.

''Destination Specific Orders'' are market or limit orders that instruct the System to route the order to a specified away trading center, after exposing the order to the BATS Options Book. Destination Specific Orders that are not executed in full after routing away are processed by the Exchange as described in Rules 21.8 and 21.9.

''BATS Only Orders'' are orders that are to be ranked and executed on the Exchange pursuant to Rule 21.8 (Order Display and Book Processing) or cancelled, as appropriate, without routing away to another trading center. A BATS Only Order that, at the time of entry, would cross a Protected Quotation will be repriced to the locking price and ranked at such price in the BATS Options Book. A BATS Only Order will be subject to the displayed price sliding process unless a User has entered instructions not to use the displayed price sliding process as set forth in Rule 21.1(d)(6).

''BATS Post Only Orders'' are orders that are to be ranked and executed on

the Exchange pursuant to Rule 21.8 or cancelled, as appropriate, without routing away to another trading center except that the order will not remove liquidity from the BATS Options Book. A BATS Post Only Order will be subject to the displayed price sliding process unless a User has entered instructions not to use the displayed price sliding process as set forth in Rule 21.1(d)(6).

''Partial Post Only at Limit Orders'' are orders that are to be ranked and executed on the Exchange pursuant to Rule 21.8 or cancelled, as appropriate, without routing away to another trading center except that the order will only remove liquidity from the BATS Options Book under the following circumstances: (a) A Partial Post Only at Limit Order will remove liquidity from the BATS Options Book up to the full size of the order if, at the time of receipt, it can be executed at prices better than its limit price (*i.e.,* price improvement); (b) regardless of any liquidity removed from the BATS Options Book under the circumstances described in paragraph (a) above, a User may enter a Partial Post Only at Limit Order instructing the Exchange to also remove liquidity from the BATS Options Book at the order's limit price up to a designated percentage of the remaining size of the order after any execution pursuant to paragraph (A) above (''Maximum Remove Percentage'') if, after removing such liquidity at the order's limit price, the remainder of such order can then post to the BATS Options Book. If no Maximum Remove Percentage is entered, such order will only remove liquidity to the extent such order will obtain price improvement as described in paragraph (A) above. A Partial Post Only at Limit Order will be subject to the displayed price sliding process unless a User has entered instructions not to use the displayed price sliding process as set forth in Rule 21.1(d)(6).

''Intermarket Sweep Orders'' or ''ISO'' are orders that shall have the meaning provided in Rule 27.1, which relates to intermarket trading. Such orders may be executed at one or multiple price levels in the System without regard to Protected Quotations at other options exchanges (*i.e.,* may trade through such quotations). The Exchange relies on the marking of an order by a User as an ISO order when handling such order, and thus, it is the entering Options Member's responsibility, not the Exchange's responsibility, to comply with the requirements relating to ISOs. ISOs are not eligible for routing pursuant to Rule 21.9.

''Directed Intermarket Sweep Orders'' or ''Directed ISOs'' are ISOs entered by a User that bypass the System and are immediately routed by the Exchange to another options exchange specified by the User for execution. It is the entering Member's responsibility, not the Exchange's responsibility, to comply with the requirements relating to Intermarket Sweep Orders.

Time in Force Designations. Options Members entering orders into the System may designate such orders to remain in force and available for display and/or potential execution for varying periods of time. Unless cancelled earlier, once these time periods expire, the order (or the unexecuted portion thereof) is returned to the entering party.

''Good Til Day or ''GTD'' shall mean, for orders so designated, that if after entry into the System, the order is not fully executed, the order (or the unexecuted portion thereof) shall remain available for potential display and/or execution for the amount of time during such trading day specified by the entering User unless canceled by the entering party.

''Immediate Or Cancel'' or ''IOC'' shall mean, for an order so designated, a limit order that is to be executed in whole or in part as soon as such order is received, and the portion not so executed is cancelled.

''DAY'' shall mean, for an order so designated, a limit order to buy or sell which, if not executed expires at market close.

''WAIT'' shall mean for orders so designated, that upon entry into the System, the order is held for one second without processing for potential display and/or execution. After one second, the order is processed for potential display and/or execution in accordance with all order entry instructions as determined by the entering party. This modifier is designed to enhance compliance with the order exposure requirement set forth in Rule 22.12 (Order Exposure Requirements). Rule 22.12 would prohibit Options Members from executing as principal on BATS Options orders they represent as agent unless (i) agency orders are first exposed on BATS Options for at least one (1) second or (ii) the Options Member has been bidding or offering on BATS Options for at least one (1) second prior to receiving an agency order that is executable against such bid or offer.

One Second Exposure Period. As noted above, proposed Rule 22.12 would require Options Members to expose their customers' orders on the Exchange for at least one second under certain circumstances. During this one second exposure period, other Options Members will be able to enter orders to trade against the exposed order. In adopting a one-second order exposure period, the Exchange is proposing a requirement that is consistent with the Rules of other options exchanges.[5] Thus, the exposure period will allow Options Members that are members of other options exchanges to comply with Rule 22.12 without programming separate time parameters into their systems for order entry or compliance purposes. The Exchange believes that market participants are sufficiently automated that a one second exposure period allows an adequate time for market participants to electronically respond to an order. Also, it is possible that market participants might wait until the end of the exposure period, no matter how long, before responding. Thus, the Exchange believes that any longer than one second would not further the protection of investors or market participants, but rather, would potentially increase market risk to investors and other market participants by creating a longer period of time for the exposed order to be subject to market risk.

The Exchange's trading system for BATS Options is identical to the trading system currently used for equities trading on the Exchange today. The Exchange has had ample experience with that trading system to believe that one second is an adequate exposure period.[6] Further, the Exchange believes that many of its current Members will be Options Members and that such current Members have demonstrated an ability to respond to orders in a timely fashion.

Member Match Trade Prevention Modifiers. As with its equities market, the Exchange will allow Options Members to use Member Match Trade Prevention (''MMTP'') Modifiers. Any incoming order designated with an MMTP modifier will be prevented from executing against a resting opposite side order also designated with an MMTP modifier and originating from the same market participant identifier (''MPID''), Exchange Member identifier or Exchange Sponsored Participant identifier.

Market Opening Procedures. The System shall open options, other than

[5] *See, e.g.,* CBOE Rules 6.45A, 6.45B, 6.74A and 6.74B; ISE Rule 717(d); NOM Chapter VII, Sec. 12.

[6] For instance, for approximately three months in 2009, the Exchange offered functionality that exposed marketable orders to Exchange Members prior to routing, canceling or posting the order to the Exchange's order book. *See* Release No. 34–60040 (June 3, 2009), 74 FR 27577 (June 10, 2009). Pursuant to that functionality, orders were exposed to Exchange Members for a variable period of time up to 500 milliseconds. In the Exchange's experience, Exchange Members were able to and frequently did respond to such exposed orders.

index options, for trading based on the first transaction after 9:30 a.m. Eastern Time in the securities underlying the options as reported on the first print disseminated pursuant to an effective national market system plan. With respect to index options, the System shall open such options for trading at 9:30 a.m. Eastern Time. Because the exchange does not propose to adopt an opening cross or similar process, the opening trade that occurs on the Exchange will be a trade in the ordinary course of dealings on the Exchange. Accordingly, the System will ensure that the opening trade in an options series will not trade through a Protected Quotation (as defined in Rule 27.2) at another options exchange, consistent with the general standard regarding trade throughs articulated in proposed Rule 21.6(e).

Order Display/Matching System. The System will be based upon functionality currently approved for use in the Exchange's equities trading system. Specifically, the System will allow Options Members to enter market orders and priced limit orders to buy and sell BATS Options-listed options. The orders will be designated for display (price and size) on an anonymous basis in the order display service of the System.

Routing. The BATS Options Exchange will support orders that are designated to be routed to the National Best Bid and Offer (''NBBO'') as well as orders that will execute only within BATS Options. Orders that are designated to execute at the NBBO will be routed to other options markets to be executed when the Exchange is not at the NBBO consistent with the Options Order Protection and Locked/Crossed Market Plan. Subject to the exceptions contained in proposed Rule 27.2(b), the System will ensure that an order will not be executed at a price that trades through another options exchange. An order that is designated by an Options Member as routable will be routed in compliance with applicable Trade-Through restrictions. Any order entered with a price that would lock or cross a Protected Quotation that is not eligible for either routing or the displayed price sliding process as defined in proposed Rule 21.1(d)(6) will be cancelled.

BATS Options shall route orders in options via BATS Trading, Inc. (''BATS Trading''), which serves as the Outbound Router of the Exchange, as defined in Rule 2.11 (BATS Trading, Inc.). The function of the Outbound Router will be to route orders in options listed and open for trading on BATS Options to other options exchanges pursuant to BATS Options rules solely on behalf of BATS Options. The Outbound Router is subject to regulation as a facility of the Exchange, including the requirement to file proposed rule changes under Section 19 of the Act. Use of BATS Trading or Routing Services (as described below) to route orders to other market centers is optional. Parties that do not desire to use BATS Trading or other Routing Services provided by the Exchange must designate orders as not available for routing.

In the event the Exchange is not able to provide order routing services through its affiliated broker-dealer, the Exchange will route orders to other options exchanges in conjunction with one or more routing brokers that are not affiliated with the Exchange (''Routing Services'').

Book Processing. The System, like the equities facility, shall execute trading interest within the System in price/time priority, meaning it will execute all trading interest at the best price level within the System before executing trading interest at the next best price. Trading interest will be executed in the order set forth below, with the order clearly established as the first entered into the System within such category at each price level having priority up to the number of contracts specified in the order. At each price level between displayed trading interest, orders will be executed in the following priority: (a) Price Improving Orders and orders subject to displayed price sliding and then (b) discretionary portion of discretionary orders as set forth in Rule 21.1(d)(4). At each price level that has displayed trading interest, orders will be executed in the following priority: (a) Orders that are displayed within the System, then (b) the Non-Displayed portion of Reserve Orders, and then the (c) discretionary portion of discretionary orders as set forth in Rule 21.1(d)(4). Any order entered with a price that would lock or cross a Protected Quotation that is not eligible for either routing or the displayed price sliding process as defined in Rule 21.1(d)(6) will be cancelled.

Data Feed. The System will include a proprietary data feed which will display without attribution to Members' MPIDs Displayed Orders on both the bid and offer side of the market for price levels then within BATS Options using the minimum price variation applicable to that security.

$1 Strike Program. Pursuant to proposed Rule 19.6, Supplementary Material .02, the interval between strike prices of series of options on individual stocks may be $1.00 or greater (''$1 Strike Prices'') provided the strike price is $50 or less, but not less than $1. The listing of $1 strike prices shall be limited to option classes overlying no more than fifty-five (55) individual stocks (the ''$1 Strike Price Program'') as specifically designated by BATS Options. BATS Options may list $1 Strike Prices on any other option classes if those classes are specifically designated by other national securities exchanges that employ a similar $1 Strike Price Program under their respective rules.

To be eligible for inclusion into the $1 Strike Price Program, an underlying security must close below $50 in the primary market on the previous trading day. After a security is added to the $1 Strike Price Program, BATS Options may list $1 Strike Prices from $1 to $50 that are no more than $5 from the closing price of the underlying on the preceding day. For example, if the underlying security closes at $13, BATS Options may list strike prices from $8 to $18. BATS Options may not list series with $1 intervals within $0.50 of an existing $2.50 strike price (e.g., $12.50, $17.50) in the same series. Additionally, for an option class selected for the $1 Strike Price Program, BATS Options may not list $1 Strike Prices on any series having greater than nine (9) months until expiration. A security shall remain in the $ 1 Strike Price Program until otherwise designated by BATS Options.

For options classes selected to participate in the $1 Strike Program, the Exchange will, on a monthly basis, review series that were originally listed under the $1 Strike Program with strike prices that are more than $5 from the current value of an options class and delist those series with no open interest in both the put and the call series having a: (1) Strike higher than the highest strike price with open interest in the put and/or call series for a given expiration month; and (2) strike lower than the lowest strike price with open interest in the put and/or call series for a given expiration month. If the Exchange identifies series for delisting pursuant to this policy, the Exchange shall notify other options exchanges with similar delisting policies regarding the eligible series for delisting, and shall work jointly with such other exchanges to develop a uniform list of series to be delisted so as to ensure uniform series delisting of multiply listed options classes.

Notwithstanding the above delisting policy, the Exchange may grant member requests to add strikes and/or maintain strikes in series of options classes traded pursuant to the $1 Strike Program that are eligible for delisting.

With regard to the impact on system capacity, the Exchange has analyzed its capacity and represents that it and the Options Price Reporting Authority have the necessary systems capacity to handle the additional traffic associated with the listing and trading of option series that may be listed and traded in $1 strikes.

In addition to $1 strikes as proposed above, the Exchange proposes to offer options trading on series of options with $2.50 strike price intervals, consistent with other options exchanges.

Options Order Protection and Locked/Crossed Market Plan Rules

The Exchange will participate in the recently-approved Options Order Protection and Locked/Crossed Market Plan (''New Plan''), and therefore will be required to comply with the obligations of Participants under the New Plan. The Exchange proposes to adopt rules relating to the New Plan that are substantially similar to the rules in place on or proposed by all of the options exchanges that are Participants to the New Plan.

The New Plan replaced the Plan for the Purpose of Creating and Operating an Intermarket Option Linkage (''Old Plan''). The Old Plan required its participant exchanges to operate a stand-alone system or ''Linkage'' for sending order-flow between exchanges to limit trade-throughs, and the Linkage was operated by the Options Clearing Corporation (''OCC''). The New Plan essentially applies the Regulation NMS price-protection provisions to the options markets. Similar to Regulation NMS, the New Plan requires the New Plan Participants to adopt rules ''reasonably designed to prevent Trade-Throughs,'' while exempting Intermarket Sweep Orders (''ISOs'') from that prohibition. The New Plan's proposed definition of an ISO is essentially the same as under Regulation NMS. The remaining exceptions to the trade-through prohibition, discussed more specifically below, either track those under Regulation NMS or correspond to unique aspects of the options market, or both.

The Rules in Chapter XXVII conform to the requirements of the New Plan. Rule 27.1 sets forth the defined terms for use under the New Plan. Rule 27.2 prohibits trade-throughs and exempts ISOs from that prohibition. Rule 27.2 also contains additional exceptions to the trade-through prohibition that track the exceptions under Regulation NMS or correspond to unique aspects of the BATS Options Exchange, or both.

Rule 27.3 sets forth the general prohibition against locking/crossing other eligible exchanges as well as several exceptions that permit locked markets in limited circumstances; such exceptions have been approved by the Commission for inclusion in the rules of other options exchanges. Specifically, the exceptions to the general prohibition on locking and crossing occur when (1) the locking or crossing quotation was displayed at a time when the Exchange was experiencing a failure, material delay, or malfunction of its systems or equipment; (2) the locking or crossing quotation was displayed at a time when there is a Crossed Market; or (3) the Member simultaneously routed an ISO to execute against the full displayed size of any locked or crossed Protected Bid or Protected Offer.

Rule 27.4 provides that the Exchange will continue to accept Principal Acting as Agent (''P/A'') and Principal Orders from options exchanges that continue to use such orders to address trade-throughs via the Linkage for a temporary period.

Securities Traded on BATS Options

General Listing Standards. The Exchange proposes to adopt listing standards for Options traded on BATS Options (Chapter XIX) as well as for Index Options (Chapter XXIX) that are identical to the approved rules of other options exchanges.[7] The Exchange will join the Options Listings Procedures Plan and will list and trade options already listed on other options exchanges. The Exchange will gradually phase-in its trading of options, beginning with a selection of actively traded options. At least initially, the Exchange does not plan to develop new options products or listing standards.

Quarterly Options Series Program. Pursuant to proposed Rule 29.11(g) the Exchange may list and trade options series that expire at the close of business on the last business day of a calendar quarter (''Quarterly Options Series''). The Exchange may list Quarterly Options Series for up to five (5) currently listed options classes that are either options on exchange traded funds (''ETF'') or index options. In addition, the Exchange may also list Quarterly Options Series on any options classes that are selected by other securities exchanges that employ a similar program under their respective rules.

The Exchange may list series that expire at the end of the next consecutive four (4) calendar quarters, as well as the fourth quarter of the next calendar year. For example, if the Exchange is trading Quarterly Options Series in the month of May 2010, it may list series that expire at the end of the second, third, and fourth quarters of 2010, as well as the first and fourth quarters of 2011. Following the second quarter 2010 expiration, the Exchange could add series that expire at the end of the second quarter of 2011.

For each class of ETF options selected for the Quarterly Options Series program, the Exchange may list strike prices within $5 from the previous day's closing price of the underlying security at the time of initial listing. Subsequently, the Exchange may list up to 60 additional strike prices that are within thirty percent (30%) of the previous day's close, or more than 30% away from the previous day's close provided demonstrated customer interest exists for such series.[5] [sic]

The Exchange has also proposed a delisting policy with respect to Quarterly Options Series in ETF options. On a monthly basis, the Exchange will review series that are outside of a range of five (5) strikes above and five (5) strikes below the current price of the ETF, and delist series with no open interest in both the call and the put series having a (1) strike higher than the highest price with open interest in the put and/or call series for a given expiration month; and (2) strike lower than the lowest strike price with open interest in the put and/or the call series for a given expiration month. Notwithstanding the delisting policy, customer requests to add strikes and/or maintain strikes in Quarterly Options Series eligible for delisting shall be granted.

The Exchange also may list Quarterly Option Series based on an underlying index pursuant to similar provisions in Rule 29.11. There are two noteworthy distinctions between the rules for listing Quarterly Options Series based on an ETF versus Quarterly Options Series based on an index. First, whereas the initial listing of Quarterly Options Series based on an underlying ETF is restricted to strike prices within $5 from the previous day's closing price of the underlying security, the initial listing of strikes for Quarterly Options Series based on an underlying index is restricted to: (i) A price that is within thirty percent (30%) of the previous day's close, and (ii) no more than five strikes above and five strikes below the value of the underlying index. Second, whereas the Exchange may list up to 60 additional strike prices for each Quarterly Options Series based on an ETF, there is no firm cap on the additional listing of strikes for Quarterly Options Series based on an underlying index; rather, additional strike prices

[7] *See* Rules of NOM, Chapters IV and XIV and the Rules of BOX, Chapters IV and XIV.

may be listed provided the new listings do not result in more than five strike prices on the same side of the underlying index value as the new listings.

The interval between strike prices on Quarterly Options Series shall be the same as the interval for strike prices for series in that same options class that expire in accordance with the normal monthly expiration cycle.

With regard to the impact on system capacity, the Exchange has analyzed its capacity and represents that it and the Options Price Reporting Authority have the necessary systems capacity to handle the additional traffic associated with the listing and trading of options series pursuant to the above-described Quarterly Options Series program.

Conduct and Operational Rules for Options Members

BATS proposes to adopt rules that are substantially similar to the approved rules of other options exchanges. Thus, BATS proposes to adopt rules that are substantially similar to the rules of NOM regarding: exercises and deliveries (Chapter XXIII); records, reports and audits (Chapter XXIV); and minor rule violations (Chapter XXV).

BATS proposes to adopt rules that are similar to the rules of NOM, with certain proposed changes and omissions, regarding: doing business with the public (Chapter XXVI); and margin (Chapter XXVIII). For example, with respect to its rules applicable to doing business with the public, contained in proposed Chapter XXVI, BATS has not proposed rules consistent with certain NOM rules to the extent the Exchange believes such requirements are contained in other sections of the Exchange's existing Rules or that such requirements are not consistent with the Exchange's existing regulatory structure. For example, the Exchange has consolidated applicable rules requiring options principal registration into proposed BATS Rule 17.2(g) because, as proposed, Options Principal registration is not limited to personnel associated with Options Members that do business with the public. Similarly, the Exchange intends to require Authorized Traders of Options Members to comply with existing Exchange registration requirements applicable to all Authorized Traders.[8] Accordingly, the Exchange has omitted specific rules applicable to registration of representatives. As another example, the Exchange has not proposed addition of a fidelity bond requirement to its doing business with the public rules for BATS Options, but rather, as noted below, has proposed addition of a fidelity bond rule (Rule 2.12) to its general membership rules. With respect to its proposed margin rules, contained in proposed Chapter XXVIII, the Exchange has not proposed adoption of a rule applicable to joint back office arrangements because proposed Rule 28.3 requires Options Members to comply with either the margin rules of the New York Stock Exchange or the Chicago Board Options Exchange, and both exchanges have rules that address joint back office requirements. Thus, although the Exchange has proposed rules that differ in certain instances from the rules of NOM, the Exchange does not believe that such differences create any material regulatory gaps between the rules applicable to Exchange Options Members and members of other options exchanges.

BATS further proposes to adopt Business Conduct Rules (Chapter XVIII) that are consistent with the NOM and BOX Business Conduct Rules, with certain exceptions.[9] Specifically, with respect to Position Limits (Rule 18.7) and Exercise Limits (Rule 18.9), the Exchange is proposing to apply the limits established pursuant to the rules of the Chicago Board Options Exchange (''CBOE''), although the Exchange will establish such limits for products not traded on the CBOE. By expressly incorporating an already-approved limit, the Exchange will ensure that an appropriate limit is in place at all times without the need to continually adjust its rule manually or to disrupt the operations of its Members. With respect to financial and operational rules, the Exchange proposes to adopt rules similar to those of existing options exchanges regarding: exercises and deliveries, margin, net capital, and books and records.

National Market System

The BATS Options Exchange will operate as a full and equal participant in the national market system for options trading established under Section 11A of the Exchange Act, just as its equities market participates today. The BATS Options Exchange will become a member of the Options Price Reporting Authority (''OPRA''), the Options Linkage Authority (''OLA''), the Options Regulatory Surveillance Authority (''ORSA''), and the Options Listing Procedures Plan (''OLPP'').

The Exchange expects to participate in those plans on the same terms currently applicable to current members of those plans, and it expects little or no plan impact due to the fact that the Exchange's market will operate on price/time priority. The Exchange has contacted the leadership of each options-related national market system plan to begin the membership process.

Regulation

The Exchange will leverage many of the structures it established to operate a national securities exchange in compliance with Section 6 of the Exchange Act. As described in more detail below, there will be three elements of that regulation: (1) The Exchange will join the existing options industry agreements pursuant to Section 17(d) of the Exchange Act, as it did with respect to equities, (2) the Exchange's Regulatory Services Agreement with FINRA will govern many aspects of the regulation and discipline of Members that participate in options trading, just as it does for equities regulation, and (3) the Exchange will perform options listing regulation, as well as authorize Options Members to trade on BATS Options, and conduct surveillance of options trading as it does today for equities. Section 17(d) of the Exchange Act and the related Exchange Act rules permit SROs to allocate certain regulatory responsibilities to avoid duplicative oversight and regulation. Under Exchange Act Rule 17d–1, the SEC designates one SRO to be the Designated Examining Authority, or DEA, for each broker-dealer that is a member of more than one SRO. The DEA is responsible for the financial aspects of that broker-dealer's regulatory oversight. Because BATS Options Members also must be members of at least one other SRO, the Exchange would generally not be designated as the DEA for any of its members.

Rule 17d–2 under the Act permits SROs to file with the Commission plans under which the SROs allocate among each other the responsibility to receive regulatory reports from, and examine and enforce compliance with specified provisions of the Act and rules thereunder and SRO rules by, firms that are members of more than one SRO (''common members''). If such a plan is declared effective by the Commission, an SRO that is a party to the plan is relieved of regulatory responsibility as to any common member for whom responsibility is allocated under the plan to another SRO.

All of the options exchanges, FINRA, and NYSE have entered into the Options Sales Practices Agreement, a Rule 17d–2 agreement. Under this Agreement, the examining SROs will examine firms that

[8] *See* BATS Rule 2.5, Interpretation and Policy .01 and BATS Rule 11.4.

[9] *See* Rules of NOM, Chapter III and BOX, Chapter III.

are common members of the Exchange and the particular examining SRO for compliance with certain provisions of the Act, certain of the rules and regulations adopted thereunder, certain examining SRO rules, and certain BATS Options Rules. In addition, BATS Options Rules contemplate participation in this Agreement by requiring that any Options Member also be a member of at least one of the examining SROs.

For those regulatory responsibilities that fall outside the scope of any Rule 17d–2 agreements, the Exchange will retain full regulatory responsibility under the Exchange Act. However, the Exchange has entered into a Regulatory Services Agreement with FINRA, pursuant to which FINRA personnel operate as agents for the Exchange in performing certain of these functions. As is the case with the BATS equities market, the Exchange will supervise FINRA and continue to bear ultimate regulatory responsibility for the BATS Options Exchange.

Consistent with the Exchange's existing regulatory structure, the Exchange's Chief Regulatory Officer shall have general supervision of the regulatory operations of BATS Options, including responsibility for overseeing the surveillance, examination, and enforcement functions and for administering all regulatory services agreements applicable to BATS Options. Similarly, the Exchange's existing Regulatory Oversight Committee will be responsible for overseeing the adequacy and effectiveness of Exchange's regulatory and self-regulatory organization responsibilities, including those applicable to BATS Options.

Finally, as it does with equities, the Exchange will perform automated surveillance of trading on BATS Options for the purpose of maintaining a fair and orderly market at all times. As it does with its equities trading, the Exchange will monitor BATS Options to identify unusual trading patterns and determine whether particular trading activity requires further regulatory investigation by FINRA.

In addition, the Exchange will oversee the process for determining and implementing trade halts, identifying and responding to unusual market conditions, and administering the Exchange's process for identifying and remediating ''obvious errors'' by and among its Options Members. BATS proposed rules (Chapter XX) regarding halts, unusual market conditions, extraordinary market volatility, obvious errors, and audit trail are closely modeled on the approved rules of NOM and BOX.[10]

Minor Rule Violation Plan

The Exchange's disciplinary rules, including Exchange Rules applicable to ''minor rule violations,'' are set forth in Chapter VIII of the Exchange's current Rules. Such disciplinary rules will apply to Options Members and their associated persons.

The Commission approved the BATS Exchange's Minor Rule Violation Plan (''MRVP'') in 2008.[11] The Exchange's MRVP specifies those uncontested minor rule violations with sanctions not exceeding $2,500 that would not be subject to the provisions of Rule 19d–1(c)(1) under the Act[12] requiring that an SRO promptly file notice with the Commission of any final disciplinary action taken with respect to any person or organization.[13] The Exchange's MRVP includes the policies and procedures included in Exchange Rule 8.15 (Imposition of Fines for Minor Violation(s) of Rules) and in Rule 8.15, Interpretations and Policy .01.

The Exchange proposes to amend its MRVP and Rule 8.15, Interpretation and Policy .01 to include proposed Rule 25.3 (Penalty for Minor Rule Violations).[14] The rules included in proposed Rule 25.3 as appropriate for disposition under the Exchange's MRVP are: (a) Position Limit violations for both customer accounts as well as the accounts of Options Members that are Exchange Members; (b) Order Entry violations regarding restrictions on orders entered by Market Makers, and (c) Continuous Quote violations regarding Market Maker continuous bids and offers. The rules included in Rule 25.3 are the same as the rules included in the MRVPs of other options exchanges.[15]

Upon implementation of this proposal, the Exchange will include the enumerated options trading rule violations in the Exchange's standard quarterly report of actions taken on minor rule violations under the MRVP. The quarterly report includes: The Exchange's internal file number for the case, the name of the individual and/or organization, the nature of the violation, the specific rule provision violated, the sanction imposed, the number of times the rule violation has occurred, and the date of disposition.

The Exchange's MRVP, as proposed to be amended, is consistent with Sections 6(b)(1), 6(b)(5) and 6(b)(6) of the Act, which require, in part, that an exchange have the capacity to enforce compliance with, and provide appropriate discipline for, violations of the rules of the Commission and of the exchange.[16] In addition, because amended Rule 8.15 will offer procedural rights to a person sanctioned for a violation listed in proposed Rule 25.3, the Exchange will provide a fair procedure for the disciplining of members and associated persons, consistent with Section 6(b)(7) of the Act.[17]

This proposal to include the rules listed in Rule 25.3 in the Exchange's MRVP is consistent with the public interest, the protection of investors, or otherwise in furtherance of the purposes of the Act, as required by Rule 19d–1(c)(2) under the Act,[18] because it should strengthen the Exchange's ability to carry out its oversight and enforcement responsibilities as an SRO in cases where full disciplinary proceedings are unsuitable in view of the minor nature of the particular violation. In requesting the proposed change to the MRVP, the Exchange in no way minimizes the importance of compliance with Exchange Rules and all other rules subject to the imposition of fines under the MRVP. However, the MRVP provides a reasonable means of addressing rule violations that do not rise to the level of requiring formal disciplinary proceedings, while providing greater flexibility in handling certain violations. The Exchange will continue to conduct surveillance with due diligence and make a determination based on its findings, on a case-by-case basis, whether a fine of more or less than the recommended amount is

[10] *See* Rules of NOM, Chapter V, and BOX, Chapter V.

[11] *See* Release No. 34–58807 (October 17, 2008), 73 FR 63219 (October 23, 2008) (File No. 4–568) (''MRVP Order'').

[12] 17 CFR 240.19d–1(c)(1).

[13] The Commission adopted amendments to paragraph (c) of Rule 19d–1 to allow SROs to submit for Commission approval plans for the abbreviated reporting of minor disciplinary infractions. *See* Release No. 34–21013 (June 1, 1984), 49 FR 23828 (June 8, 1984). Any disciplinary action taken by an SRO against any person for violation of a rule of the SRO which has been designated as a minor rule violation pursuant to such a plan filed with and declared effective by the Commission will not be considered ''final'' for purposes of Section 19(d)(1) of the Act if the sanction imposed consists of a fine not exceeding $2,500 and the sanctioned person has not sought an adjudication, including a hearing, or otherwise exhausted his administrative remedies.

[14] In the MRVP Order, the Commission noted that the Exchange proposed that any amendments to Rule 8.15.01 made pursuant to a rule filing submitted under Rule 19b–4 of the Act would automatically be deemed a request by the Exchange for Commission approval of a modification to its MRVP. *See* MRVP Order, *supra* note 11, at note 6.

[15] *See, e.g.,* NOM, Chapter X, Section 7, and BOX, Chapter X, Section 2.

[16] 15 U.S.C. 78f(b)(1), 78f(b)(5) and 78f(b)(6).

[17] 15 U.S.C. 78f(b)(7).

[18] 17 CFR 240.19d–1(c)(2).

appropriate for a violation under the MRVP or whether a violation requires a formal disciplinary action.

Amendments to Existing BATS Exchange Rules

In addition to the Rules proposed above, the Exchange proposes to amend certain of its existing rules in order to provide clarity regarding certain regulatory processes already utilized by the Exchange. Specifically, the Exchange proposes to add Interpretations and Policies .03 and .04 to Rule 2.5, which state that associated persons must register and terminate registration via standard industry forms, Forms U4 and U5, respectively. Such forms must be filed through the Central Registration Depositary (''CRD''). In addition, the Exchange currently requires applicants for membership in the Exchange to file information regarding their executive officers, directors, principal shareholders and general partners. The Exchange proposes to add Rule 2.6(g) in order to codify this application requirement and to require applicants approved as Members to keep such information current with the Exchange.

The Exchange also proposes to adopt new Rules 2.12 and 3.22, related to fidelity bonds and gratuities, respectively, to achieve more consistency with the regulatory structure of other exchanges. Proposed Rule 2.12 is based on NASDAQ Rule 3020, and proposed Rule 3.22 is identical to ISE Rule 406. Finally, in order to accommodate potential exemption requests pursuant to the proposed fidelity bond rule, Rule 2.12, the Exchange proposes adoption of Rule 1.6, which will provide a framework for requests for exemptions.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of the Act,[19] in general and with Section 6(b)(5) of the Act,[20] in particular, in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers, or to regulate by virtue of any authority conferred by this title matters not related to the purposes of this title or the administration of the exchange.

The BATS Options Exchange will benefit individual investors, options trading firms, and the options market generally. The entry of an innovative, low-cost competitor such as BATS Options will promote competition, spurring existing markets to improve their own execution systems and reduce trading costs. BATS Options will differentiate its market by offering executions in price/time priority, a feature that should increase order interaction and yield better executions. The execution system of the BATS Options Exchange will be designed to quote in penny increments where consistent with the Commission's penny pilot program for options, advancing the Commission's efforts to move the industry to penny quoting in an orderly fashion and helping to narrow spreads, reduce payment for order flow, and enhance price competition.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange operates in an intensely competitive global marketplace for transaction services. Relying on its array of services and benefits, the Exchange competes for the privilege of providing market services to broker-dealers. The Exchange's ability to compete in this environment is based in large part on the quality of its trading systems, the overall quality of its market and its attractiveness to the largest number of investors, as measured by speed, likelihood and cost of executions, as well as spreads, fairness, and transparency.

BATS Options will incorporate the best functional elements from the Exchange's equity market. The proposed rule change will reduce overall trading costs and increase price competition, both pro-competitive developments, and will promote further initiative and innovation among market centers and market participants.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(1) By order approve such proposed rule change, or

(2) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–BATS–2009–031 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–BATS–2009–031. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days

[19] 15 U.S.C. 78a *et seq.*

[20] 15 U.S.C. 78f(b)(5).

between the hours of 10 a.m. and 3 p.m. Copies of the filing will also be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–BATS–2009–031 and should be submitted on or before December 29, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[21]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–29203 Filed 12–7–09; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61091; File No. SR–NYSE–2009–117]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change Amending Its Listing Fees for Structured Products

December 1, 2009.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the ''Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on November 19, 2009, New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to apply a maximum fee in any calendar year (including initial and annual listing fees) of $500,000 in connection with the listing under Section 902.05 of the Listed Company Manual (the ''Manual'') of any individual issuance of securities.

The text of the proposed rule change is available on the Exchange's Web site at *http://www.nyse.com*, at the Exchange's Office of the Secretary and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to apply a maximum listing fee in any calendar year (including initial and annual listing fees) of $500,000 in connection with the listing under Section 902.05 of the Manual of any individual issuance of securities.

Section 902.05 sets forth listing fees applicable to securities traded on the equity floor of the Exchange and listed under Section 703.18, the equity criteria set out in Section 703.19, and Section 703.21. Section 902.05 currently provides that issuers of ''retail debt securities'' (i.e., debt securities that are listed under the equity criteria set out in Section 703.19 and traded on the equity floor of the Exchange) are subject to an annual maximum aggregate listing fee of $500,000 for all retail debt securities issued in a calendar year. Companies are also subject under Section 902.02 to the maximum of $500,000 per issuer for initial and annual fees payable on listed equity securities. In addition, as stated in Sections 902.02 and 902.05, the total maximum fee of $500,000 billable to an issuer in a calendar year under the fee cap in Section 902.02 includes all annual fees billed to an issuer for listed retail debt securities. By contrast, securities listed under Section 902.05 other than retail debt securities are not subject to the maximum fees set forth in Section 902.02 or any maximum fee established in Section 902.05 itself. Consequently, the Exchange believes that it is appropriate to establish a maximum fee in any calendar year (including both initial and annual listing fees) per issuance listed under Section 902.05 of $500,000. Doing so addresses an anomaly under the Exchange's fee structure, whereby issuers of securities listed under Section 902.05 (other than retail debt securities) could pay fees in excess of $500,000, while their fees for all other categories of securities would be capped. The Exchange notes that—based on historical experience—it is quite rare for a transaction to be subject to initial or annual listing fees under Section 902.05 that exceed $500,000, [sic] As such, the Exchange does not believe that the revenue it would forego as a result of the proposed fee cap would negatively affect its ability to fund its regulatory program. The Exchange believes it is appropriate to have a separate fee cap for each individual issuance of structured products, as many companies (especially in the financial sector) list multiple new classes of structured products within a calendar year, requiring the repeated utilization of the Exchange's operational and regulatory resources to a degree that is not normally the case with respect to equity securities subject to the cap under Section 902.02.

The Exchange proposes to apply Section 902.05 as amended by this filing retroactively to any securities listed on or after the date of original submission of this filing. The Exchange believes this approach is appropriate, as it will enable companies to benefit from the proposed fee cap without having to delay their listing until after Commission approval of the filing solely for the purpose of benefitting from that fee reduction. The Exchange notes that no company will pay higher initial or annual listing fees in connection with the listing of structured products as a result of the proposed amendment and some companies will pay less if their fees in relation to an individual structured product would exceed $500,000 in the absence of the proposed cap.

2. Statutory Basis

The bases under the Act for this proposed rule change are the requirement under Section 6(b)(4)[4] that an exchange have rules that provide for the equitable allocation of reasonable dues, fees and other charges among its members, listed companies and other persons using its facilities and the requirement under Section 6(b)(5)[5] that an exchange have rules that are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The

[21] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] 15 U.S.C. 78f(b)(4).

[5] 15 U.S.C. 78f(b)(5).

Exchange believes that the proposed new cap on initial and annual listing fees for structured products represents an equitable allocation of fees among its listed companies, as all companies listing structured products will be subject to the same fee schedule.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve the proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NYSE–2009–117 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSE–2009–117. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing will also be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2009–117 and should be submitted on or before December 29, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[6]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–29141 Filed 12–7–09; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61084; File No. SR–CBOE–2009–088]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fees Schedule in Connection With the New Linkage Plan

December 1, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 23, 2009, the Chicago Board Options Exchange, Incorporated (''CBOE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its Fees Schedule. The text of the proposed rule change is available on the Exchange's Web site (*http://www.cboe.org/legal*), at the Exchange's Office of the Secretary, and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

All current U.S. options exchanges recently adopted a plan to provide a framework for order protection and locked and crossed market handling called the Options Order Protection and Locked/Crossed Market Plan (the ''New Plan''). The Plan replaces the Plan for the Purpose of Creating and Operating an Intermarket Option Linkage (the ''Old Plan''). The Old Plan also provided a framework for addressing order protection and locked/crossed markets, but unlike the New Plan, the Old Plan utilized the Options Clearing Corporation as a ''hub'' for the transmission of ''linkage orders'' between exchanges. There are three types of linkage orders under the Old Plan, P/A Orders (orders sent on behalf of a non-broker dealer customer), P Orders (orders send for the principal account of an exchange market-maker), and Satisfaction Orders (orders reflecting the terms of an order resting

[6] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

on an exchange that was traded-through by another market). Although not required by the Old Plan, CBOE sought to access better prices on other exchanges on behalf of non-customer orders received by CBOE by routing P orders to such other exchanges. Section 21 of the CBOE Fees Schedule provides that costs associated with execution of such P orders on other exchanges are passed through to the members submitting the non-customer orders to CBOE.

Under the New Plan, exchanges access each other directly and not through a hub (*i.e.* through members that can provide ''front-door'' access). Now that CBOE is migrating away from the Old Plan's use of the hub to access other markets (including using P orders), the Exchange seeks to modify its Fees Schedule to account for the new method of routing non-customer orders pursuant to the New Plan. CBOE will continue to route to other exchanges on behalf of non-customer orders, but it will do so using the same member-provided direct access that is used for customer orders. CBOE does not charge routing or execution fees for customer orders routed to other exchanges. However, for any non-customer order routed to other exchanges, CBOE will assess the following costs to the member that submitted the non-customer order to CBOE: (i) Charge a $0.05 per contract routing fee, (ii) pass through all actual charges assessed by the away exchange(s) (these are calculated on an order-by-order basis since different away exchanges charge different amounts), and (iii) charge CBOE's customary execution fees applicable to the order. The routing fee helps offset costs incurred by the Exchange in connection with using an unaffiliated broker-dealer to access other exchanges. Passing through charges assessed by other exchanges for ''linkage'' executions and charging for related CBOE executions are appropriate because non-customer order flow can route directly to those exchanges if desired and the Exchange chooses not to absorb those costs at this time.

CBOE notes that not all exchanges route on behalf of non-customer orders, and that this function is an ''extra'' service provided by CBOE to its members.[3] Members are always free to route directly to other markets or to specify that CBOE not route orders away on their behalf. The new fee will become effective on November 24, 2009. Section 21 of the Fees Schedule will be deleted in the near future (after routing through the hub has ceased).

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Securities Exchange Act of 1934 (''Act''),[4] in general, and furthers the objectives of Section 6(b)(4)[5] of the Act in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among CBOE members and other persons using its facilities.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The proposed rule change is designated by the Exchange as establishing or changing a due, fee, or other charge, thereby qualifying for effectiveness on filing pursuant to Section 19(b)(3)(A)(ii)[6] of the Act and subparagraph (f)(2) of Rule 19b–4[7] thereunder.

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–CBOE–2009–088 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2009–088. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro/shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing will also be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR–CBOE–2009–088 and should be submitted on or before December 29, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[8]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–29136 Filed 12–7–09; 8:45 am]

BILLING CODE 8011–01–P

[3] For example, see Section VIII of Nasdaq OMX Phlx fee schedule (*http://www.nasdaqtrader.com/Micro.aspx?id=phlxpricing*).

[4] 15 U.S.C. 78f(b).

[5] 15 U.S.C. 78f(b)(4).

[6] 15 U.S.C. 78s(b)(3)(A)(ii).

[7] 17 CFR 240.19b–4(f)(2).

[8] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61089; File No. SR–NSCC–2009–09]

Self-Regulatory Organizations; National Securities Clearing Corporation; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Move the Canadian Depository for Securities to Risk-Based Margining

December 1, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] notice is hereby given that on October 30, 2009, the National Securities Clearing Corporation (''NSCC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change described in Items I, II, and III below, which items have been prepared primarily by NSCC. The Commission is publishing this notice to solicit comments on the proposed rule change from interested parties.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The purpose of the proposed rule change is to move the Canadian Depository for Securities Clearing and Depository Services Inc. (''CDS'') to risk-based margining (''RBM'').

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NSCC included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. NSCC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of these statements.[2]

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In 2001, NSCC introduced a RBM approach to calculating Clearing Fund requirements for settling members. The RBM approach includes, but is not limited to, calculations based on portfolio volatility and, where applicable, market maker domination.[3] This approach was implemented over time to extend to most NSCC members. The formula for the calculation of Clearing Fund requirements under the RBM approach is set forth in Procedure XV (Clearing Fund and Other Matters) of NSCC's Rules and Procedures (''Rules''). Presently, the only member that has not migrated to RBM is CDS, which is currently margined pursuant to a volume based formula outlined in Appendix 1 of the Rules.

RBM more accurately reflects NSCC's exposure than the formula set forth in Appendix 1 because it enables NSCC to more precisely identify the risks posed by a member's unsettled portfolio and, as a result, more quickly adjust and collect additional Clearing Fund deposits. Therefore, effective November 2, 2009 (''Conversion Date''), NSCC moved CDS to the Clearing Fund formula set forth in Procedure XV. Because Appendix 1 is now obsolete, NSCC is removing Appendix 1 from the Rules effective as of the Conversion Date.[4]

NSCC believes that the proposed rule change is consistent with the requirements of Section 17A of the Act[5] and the rules and regulations thereunder applicable to NSCC because the proposed rule change should enhance NSCC's ability to ensure adequate collateral levels are maintained to facilitate settlement in the event of a member default by eliminating the non-RBM-based Clearing Fund formula and thereby.

(B) Self-Regulatory Organization's Statement on Burden on Competition

NSCC does not believe that the proposed rule change will have any impact on or impose any burden on competition.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments relating to the proposed rule change have been solicited or received. NSCC will notify the Commission of any written comments received by NSCC.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective upon filing pursuant to Section 19(b)(3)(A)(iii) of the Act[6] and Rule 19b–4(f)(4)[7] thereunder because the proposed rule change effects a change in an existing service of NSCC that (i) does not adversely affect the safeguarding of securities or funds in the custody or control of NSCC or for which it is responsible and (ii) does not significantly affect the respective rights of the clearing agency or persons using the service. At any time within sixty days of the filing of such rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*) or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NSCC–2009–09 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NSCC–2009–09. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will

[1] 15 U.S.C. 78s(b)(1).

[2] The Commission has modified the text of the summaries prepared by NSCC.

[3] Securities Exchange Act Release No. 44431 (June 15, 2001), 66 FR 33280 [File No. SR–NSCC–2001–04].

[4] NSCC's Rules provide NSCC with the discretion to modify the deadline by which a member must satisfy it Clearing Fund requirement. Presently, the deadline for all members subject to RBM to satisfy their Clearing Fund requirement is 10 am. CDS has requested a 2 hour extension (to 12 pm New York Time) for a period of six months beginning on the Conversion Date to facilitate its transition to the new Clearing Fund calculation. NSCC has determined to grant this extension. The extension is necessary to allow: (i) CDS members the opportunity to fund their NSCC related deficit at CDS on a daily basis (currently, CDS is required to satisfy its Clearing Fund requirement on a weekly basis) and in U.S. dollars rather than in Canadian Treasuries as is allowed today and (ii) time for CDS to gain regulatory approval to set its deadline for collection from its member firms to a time that would allow for it to meet the 10 am deadline.

[5] 15 U.S.C. 78q–1.

[6] 15 U.S.C. 78s(b)(3)(A)(iii).

[7] 17 CFR 240.19b–4(f)(4).

post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filings also will be available for inspection and copying at the principal office of NSCC and on NSCC's Web site at *http://www.dtcc.com/legal/rule_filings/nscc/2009.php.* All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NSCC–2009–09 and should be submitted on or before December 29, 2009.

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.[8]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–29132 Filed 12–7–09; 8:45 am]

BILLING CODE 8011–01–P

SOCIAL SECURITY ADMINISTRATION

Agency Information Collection Activities: Proposed Request and Comment Request

The Social Security Administration (SSA) publishes a list of information collection packages requiring clearance by the Office of Management and Budget (OMB) in compliance with Public Law (Pub. L.) 104–13, the Paperwork Reduction Act of 1995, effective October 1, 1995. This notice includes revisions to and extensions of OMB-approved information collections.

SSA is soliciting comments on the accuracy of the agency's burden estimate; the need for the information; its practical utility; ways to enhance its quality, utility, and clarity; and ways to minimize the burden on respondents, including the use of automated collection techniques or other forms of information technology. Mail, email, or fax your comments and recommendations on the information collection(s) to the OMB Desk Officer and the SSA Director for Reports Clearance to the addresses or fax numbers shown below.

(OMB), Office of Management and Budget, Attn: Desk Officer for SSA, Fax: 202–395–6974, E-mail address: *OIRA_Submion@omb.eop.gov.*

(SSA), Social Security Administration, DCBFM, Attn: Director, Center for Reports Clearance, 1333 Annex Building, 6401 Security Blvd., Baltimore, MD 21235, Fax: 410–965–0454, E-mail address: *OPLM.RCO@ssa.gov.*

I. The information collection below is pending at SSA. SSA will submit it to OMB within 60 days from the date of this notice. To be sure we consider your comments, we must receive them no later than February 8, 2010. Individuals can obtain copies of the collection instrument by calling the SSA Director for Reports Clearance at 410–965–0454 or by writing to the above e-mail address.

1. *Farm Self-Employment Questionnaire—20 CFR 404.1082(c) & 404.1095—0960–0061.* Section 211(a) of the Social Security Act requires the existence of a trade or business as a prerequisite for determining whether an individual or partnership may have net earnings from self-employment. During a personal interview, the requesting Social Security field office uses Form SSA–7165 to elicit the information necessary to determine the existence of an agricultural trade or business and subsequent covered earnings for Social Security entitlement purposes. The respondents are applicants for Social Security benefits, whose entitlement depends on whether the worker has covered earnings from self-employment as a farmer.

Type of Request: Extension of an OMB-approved information collection.

Number of Respondents: 47,500.

Frequency of Response: 1.

Average Burden Per Response: 10 minutes.

Estimated Annual Burden: 7,917 hours.

2. *Site Review Questionnaire for Volume and Fee-for-Service Payees and Beneficiary Interview Form—20 CFR 404.2035, 404.2065, 416.665, 416.701, and 416.708—0960–0633.* SSA uses the SSA–637, Site Review Questionnaire for Volume and Fee-for-Service Payees, to obtain information from the payee about how the organization operates and carries out its representative payee responsibilities, including how it manages beneficiary funds. We then use the SSA–639, Beneficiary Interview Form, to obtain information from the beneficiaries to help corroborate the payee's statements. Due to the sensitivity of the information, SSA employees always complete the forms based on the answers respondents give during the interview. The respondents are individuals, State and local governments, non-profit and for-profit organizations that serve as representative payees and the beneficiaries they serve.

Type of Request: Extension of an OMB-approved information collection.

Form number	Number of respondents	Frequency of response	Average burden per response (minutes)	Total annual burden (hours)
SSA–637	2,001	1	2 hours	4,002
SSA–639	9,341	1	10 minutes	1,557
Totals	11,342			5,559

3. *Certification of Prisoner Identity Information—20 CFR 422.107—0960–0688.* This regulation stipulates when a valid agreement is in place, prison officials verify the identity of certain incarcerated U.S. citizens who need replacement Social Security cards. Information the prison officials provide will come from the official prison files, sent on prison letterhead. SSA uses this information to establish the applicant's identity in the replacement Social Security card process. The respondents are prison officials who certify the identity of prisoners applying for replacement Social Security cards.

Type of Request: Extension of an OMB-approved information collection.

[8] 17 CFR 200.30–3(a)(12).

Number of Respondents: 1,000.

Frequency of Response: 200.

Average Burden Per Response: 3 minutes.

Estimated Annual Burden: 10,000 hours.

II. SSA has submitted the information collections listed below to OMB for clearance. Your comments on the information collections would be most useful if OMB and SSA receive them within 30 days from the date of this publication. To be sure we consider your comments, we must receive them no later than January 7, 2010. You can obtain a copy of the OMB clearance packages by calling the SSA Director for Reports Clearance at 410–965–0454 or by writing to the above e-mail address.

1. *Application for Widow's or Widower's Insurance Benefits—20 CFR 404.335–404.338, 404.603—0960–0004.* SSA uses the information it collects on the SSA–10–BK to determine whether the applicant meets the statutory and regulatory conditions for entitlement to widow's or widower's Social Security Title II benefits. The respondents are applicants for widow's or widower's insurance benefits.

Type of Request: Revision of an OMB-approved information collection.

Number of Respondents: 341,560.

Collection method	Number of respondents	Estimated completion time	Burden hours
MCS	162,241	15 minutes	40,560
MCS/Signature Proxy	162,241	14 minutes	37,856
Paper	17,078	15 minutes	4,270
Totals:	341,560		82,686

Estimated Annual Burden: 82,686 hours.

2. *Employment Relationship Questionnaire—20 CFR 404.1007—0960–0040.* SSA obtains information on Form SSA–7160–F4 to determine a worker's employment status; i.e., whether, under the definition of an employee found in Section 210(j)(2) of the Act and 20 CFR 404.1007 of the Code of Federal Regulations, a worker is an employee under the ''usual common law rules'' applicable in determining the existence of an employer-employee relationship. We use the information to develop the employment relationship and to determine whether a beneficiary is self-employed or an employee. The respondents are individuals questioning their status as employees and their alleged employers.

Type of Request: Extension of an OMB-approved information collection.

Respondent type	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated annual burden (hours)
Individuals	8,000	1	25	3,333
Businesses	7,200	1	25	3,000
State/Local Government	800	1	25	333
Totals:	16,000			6,666

3. *Substitution of Party upon Death of Claimant—20 CFR 404.957(c)(4) and 416.1457(c)(4)—0960–0288.* SSA collects information on Form HA–539 when a claimant for Social Security or Supplemental Security Income (SSI) payments dies while his or her request for a hearing is pending. The information SSA collects establishes a written record of the request of any individual who asks to be made a substitute party for a deceased claimant. It also facilitates a decision by SSA on who, if anyone, should become a substitute party for the deceased. The Administrative Law Judge and the hearing office support staff use this information to: (1) Establish the relationship of the requester to the deceased claimant; (2) determine the substituted individual's wishes regarding an oral hearing or decision on the record; and (3) admit the data into the claimant's official record as an exhibit. The respondents are individuals requesting to be made a substitute party for a deceased claimant.

Type of Request: Revision of an OMB-approved information collection.

Number of Respondents: 4,000.

Frequency of Response: 1.

Average Burden per Response: 5 minutes.

Estimated Annual Burden: 333 hours.

4. *Response to Notice of Revised Determination—20 CFR 404.913–.914, 404.992(b), 416.1413–.1414 and 416.1492(d)—0960–0347.* When SSA determines that: (1) A claimant for initial disability benefits does not actually have a disability; or (2) the current recipient's disability ceased, the agency must notify the disability claimants/recipients of this decision. In response to this notice, the affected claimant and disability recipient has the following recourse: (1) May request a disability hearing to contest SSA's decision; and (2) may submit additional information or evidence for SSA to consider. Disability claimants, recipients, and their representatives use form SSA–765 to accomplish these two actions. The respondents are disability claimants, current disability recipients, or their representatives.

Type of Request: Extension of an OMB-approved information collection.

Number of Respondents: 1,925.

Frequency of Response: 1.

Average Burden per Response: 30 minutes.

Estimated Annual Burden: 963 hours.

5. *Statement of Household Expenses and Contributions—20 CFR 416.1130–416.1148—0960–0456.* SSA uses the information from Form SSA–8011–F3, to determine whether the claimant or recipient receives in-kind support and maintenance. This is necessary to determine the claimant's or recipient's eligibility for SSI and the payment amount. SSA does not use this form for all claims and post eligibility determinations. SSA uses this form only in cases where SSA needs the householder's (head of household) corroboration of in-kind support and maintenance. Respondents are householders where an SSI applicant or recipient resides.

Note: This is a correction notice. SSA published this information collection as an extension on October 06, 2009 at 74 FR 51353. Since we are revising the Privacy Act Statement, this is now a revision of an OMB-approved information collection.

Type of Request: Revision of an OMB-approved information collection.

Number of Respondents: 400,000.

Frequency of Response: 1.

Average Burden per Response: 15 minutes.

Estimated Annual Burden: 100,000 hours.

6. *Privacy and Disclosure of Official Records and Information; Availability of Information and Records to the Public—20 CFR 401.40(b)&(c), 401.55(b), 401.100(a), 402.130, 402.185—0960–0566.* Under the Privacy and Disclosure of Official Records and Information, SSA established methods for the public to: access their SSA records; disclose SSA records to others; correct/amend their SSA records; consent to release their records; request records under the Freedom of Information Act (FOIA); and request waiver/reduction of fees normally charged for release of FOIA records. SSA most often collects the required information for these requests through a written letter, with the exception of the consent for release of records for which there is Form SSA–3288. Respondents are individuals requesting access to, correction of, or disclosure of SSA records.

Type of Request: Revision of an OMB-approved information collection.

Type of request	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated annual burden (hours)
Access to Records	10,000	1	11	1,833
Designating a Representative for Disclosure of Records	3,000	1	2	6,000
Amendment of Records	100	1	10	17
Consent for Release of Records	3,000,000	1	3	150,000
FOIA Requests for Records	15,000	1	5	1,250
Waiver/Reduction of Fees	400	1	5	33
Totals	3,028,500	.....	.....	159,133

7. *Request for Reinstatement (Title II)—20 CFR 404.1592b—404.1592f—0960–0742.* Through Form SSA–371, SSA obtains a signed statement from individuals stating a request for Expedited Reinstatement (EXR) of their Title II disability benefits and proof the requestor meets the EXR requirements. SSA maintains the form in the disability folder of the applicant to demonstrate the individual's awareness of the EXR requirements and his or her choice to request EXR. Respondents are individuals requesting expedited reinstatement of their Title II disability benefits.

Note: This is a correction notice. SSA published this information collection as an extension on October 06, 2009 at 74 FR 51353. Since we are revising the Privacy Act Statement, this is now a revision of an OMB-approved information collection.

Type of Request: Revision of an OMB-approved information collection.

Number of Respondents: 10,000.

Frequency of Response: 1.

Average Burden per Response: 2 minutes.

Estimated Annual Burden: 333 hours.

8. *Request for Reinstatement (Title XVI)—20 CFR 416.999—416.999d—0960–0744.* Through the SSA–372, SSA obtains a signed statement from individuals stating a request for EXR of their Title XVI SSI payments and proof the requestor meets the EXR requirements. SSA maintains the form in the disability folder of the applicant to demonstrate the individual's awareness of the EXR requirements and his or her choice to request EXR. Respondents are individuals requesting expedited reinstatement of their Title XVI SSI payments.

Type of Request: Revision of an OMB-approved information collection.

Number of Respondents: 2,000.

Frequency of Response: 1.

Average Burden per Response: 2 minutes.

Estimated Annual Burden: 67 hours.

Dated: December 2, 2009.

Elizabeth A. Davidson,

Director, Center for Reports Clearance, Social Security Administration.

[FR Doc. E9–29119 Filed 12–7–09; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF STATE

[Public Notice 6832]

Town Hall Meeting To Consider the Establishment of a U.S. Commission on Cultural Materials Displaced During World War II, and the Implementation of the Art Restitution Provisions of the June 30, 2009 Terezin Declaration

The Department of State's Special Envoy for Holocaust Issues is calling a Town Hall Meeting January 7, 2010 from 1 p.m. to 4 p.m. at the Department to get the views of interested individuals and organizations on the establishment of a U.S. commission on cultural materials displaced during World War II. The meeting will also discuss the June 30, 2009 Terezin Declaration, the text of which is at *http://www.state.gov/p/eur/rls/or/126162.htm.*

Individuals wishing to attend this Town Hall Meeting should register no later than January 5, 2010 by emailing the following information to Ms. Carolyn Jones-Johnson (*Jones-JohnsonCD@state.gov*):

Full Name

Date of Birth

Number of Government-issued Picture ID (Driver's License Number, including State of Issuance, U.S. Passport or Alternate Government-Issued Picture ID)

Organization which you represent, and its Address and Phone Number

Home Address (only if attending as an individual)

Those who register are urged to arrive at the Department by 12:45 p.m. to allow time for security screening. Upon arrival, show a valid government-issued identification (a U.S. state driver's license or a U.S. passport.) The official address of the State Department is 2201 C Street, NW., Washington, DC. Attendees should use the ''23rd Street Entrance'' on the West Side of the State Department's Harry S. Truman Building, located on 23rd Street between C Street and D Street, NW., Washington, DC.

Written comments on the above subjects may also be provided to the same e-mail address for Ms. Jones-Johnson cited above.

Dated: December 2, 2009.

Ambassador J. Christian Kennedy,

Special Envoy for Holocaust Issues, Department of State.

[FR Doc. E9–29226 Filed 12–7–09; 8:45 am]

BILLING CODE 4710–23–P

DEPARTMENT OF STATE

In the Matter of the Review of the Designation of Asbat al-Ansar, AKA Band of Helpers, AKA Band of Partisans, AKA League of Partisans, AKA League of the Followers, AKA God's Partisans, AKA Gathering of Supporters, AKA Partisan's League, AKA AAA, AKA Esbat al-Ansar, AKA Isbat al-Ansar, AKA Osbat al-Ansar, AKA Usbat al-Ansar, AKA Usbat ul-Ansar, and, Continuity, Irish Republican Army, AKA CIRA, AKA Continuity Army Council, AKA Continuity IRA, AKA Republican Sinn Fein as a Foreign Terrorist Organization Pursuant to Section 219 of the Immigration and Nationality Act, as Amended

Based upon a review of the Administrative Records assembled in these matters pursuant to Section 219(a)(4)(C) of the Immigration and Nationality Act, as amended (8 U.S.C. 1189(a)(4)(C)) (''INA''), and in consultation with the Attorney General and the Secretary of the Treasury, I conclude that the circumstances that were the basis for the 2004 re-designation of the aforementioned organizations as foreign terrorist organizations have not changed in such a manner as to warrant revocation of the designations and that the national security of the United States does not warrant a revocation of the designations.

Therefore, I hereby determine that the designations of the aforementioned organizations as foreign terrorist organizations, pursuant to Section 219 of the INA (8 U.S.C. 1189), shall be maintained.

This determination shall be published in the **Federal Register**.

Dated: November 27, 2009.

James B. Steinberg,

Deputy Secretary of State, Department of State.

[FR Doc. E9–29225 Filed 12–7–09; 8:45 am]

BILLING CODE 4710–10–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

[Docket No. WTO/DS402]

WTO Dispute Settlement Proceeding Regarding United States—Use of Zeroing in Anti-Dumping Measures Involving Products From Korea

AGENCY: Office of the United States Trade Representative.

ACTION: Notice; request for comments.

SUMMARY: The Office of the United States Trade Representative (''USTR'') is providing notice that on November 24, 2009, the Republic of Korea requested consultations with the United States under the *Marrakesh Agreement Establishing the World Trade Organization* (''WTO Agreement'') concerning certain issues relating to the imposition of antidumping measures on stainless steel plate in coils, stainless steel sheet and strip in coils, and diamond sawblades and parts thereof from Korea. That request may be found at *http://www.wto.org* contained in a document designated as WT/DS402/1. USTR invites written comments from the public concerning the issues raised in this dispute.

DATES: Although USTR will accept any comments received during the course of the dispute settlement proceedings, comments should be submitted on or before January 8, 2010, to be assured of timely consideration by USTR.

ADDRESSES: Public comments should be submitted electronically to *www.regulations.gov,* docket number USTR–2009–0040. If you are unable to provide submissions by *www.regulations.gov,* please contact Sandy McKinzy at (202) 395–9483 to arrange for an alternative method of transmission. If (as explained below) the comment contains confidential information, then the comment should be submitted by fax only to Sandy McKinzy at (202) 395–3640.

FOR FURTHER INFORMATION CONTACT: Leigh Bacon, Associate General Counsel, Office of the United States Trade Representative, 600 17th Street, NW., Washington, DC 20508, (202) 395–5859.

SUPPLEMENTARY INFORMATION: USTR is providing notice that consultations have been requested pursuant to the WTO *Understanding on Rules and Procedures Governing the Settlement of Disputes* (''DSU''). If such consultations should fail to resolve the matter and a dispute settlement panel is established pursuant to the DSU, such panel, which would hold its meetings in Geneva, Switzerland, would be expected to issue a report on its findings and recommendations within nine months after it is established.

Major Issues Raised by Korea

On November 24, 2009, Korea requested consultations regarding antidumping measures on stainless steel plate in coils, stainless steel sheet and strip in coils, and diamond sawblades and parts thereof from Korea. Korea challenges the use by the U.S. Department of Commerce (''Commerce'') of what Korea describes as ''the practice of 'zeroing' negative dumping margins in calculating overall weighted average margins of dumping'' in the final and amended determinations and antidumping duty order with respect to stainless steel plate in coils from Korea, in the final and amended determinations and antidumping duty order with respect to stainless steel sheet and strip in coils from Korea, and in the final determination and antidumping duty order with respect to diamond sawblades and parts thereof from Korea. Korea states that it considers these actions to be inconsistent with the obligations of the United States under Article VI of the *General Agreement on Tariffs and Trade 1994* (''GATT 1994''), and Articles 1, 2.1, 2.4, 2.4.2, and 5.8 of the *Agreement on Implementation of Article VI of the GATT 1994.*

Public Comment: Requirements for Submissions

Interested persons are invited to submit written comments concerning the issues raised in this dispute. Persons may submit public comments electronically to *www.regulations.gov* docket number USTR–2009–0040. If you are unable to provide submissions by *www.regulations.gov,* please contact Sandy McKinzy at (202) 395–9483 to arrange for an alternative method of transmission.

To submit comments via *www.regulations.gov*, enter docket number USTR–2009–0040 on the home page and click ''search.'' The site will provide a search-results page listing all documents associated with this docket. Find a reference to this notice by selecting ''Notice'' under ''Document Type'' on the left side of the search-results page, and click on the link entitled ''Submit a Comment.'' (For further information on using the *www.regulations.gov* Web site, please consult the resources provided on the Web site by clicking on ''How To Use This Site'' on the left side of the home page.)

The *www.regulations.gov* site provides the option of providing

comments by filling in a ''Type Comment and Upload File'' field, or by attaching a document. It is expected that most comments will be provided in an attached document. If a document is attached, it is sufficient to type ''See attached'' in the ''Type Comment and Upload File'' field.

A person requesting that information contained in a comment submitted by that person be treated as confidential business information must certify that such information is business confidential and would not customarily be released to the public by the submitter. Confidential business information must be clearly designated as such and the submission must be marked ''BUSINESS CONFIDENTIAL'' at the top and bottom of the cover page and each succeeding page. Any comment containing business confidential information must be submitted by fax to Sandy McKinzy at (202) 395–3640. A non-confidential summary of the confidential information must be submitted to *www.regulations.gov.* The non-confidential summary will be placed in the docket and open to public inspection.

Information or advice contained in a comment submitted, other than business confidential information, may be determined by USTR to be confidential in accordance with section 135(g)(2) of the Trade Act of 1974 (19 U.S.C. 2155(g)(2)). If the submitter believes that information or advice may qualify as such, the submitter—

(1) Must clearly so designate the information or advice;

(2) Must clearly mark the material as ''SUBMITTED IN CONFIDENCE'' at the top and bottom of the cover page and each succeeding page; and

(3) Must provide a non-confidential summary of the information or advice.

Any comment containing confidential information must be submitted by fax. A non-confidential summary of the confidential information must be submitted to *www.regulations.gov.* The non-confidential summary will be placed in the docket and open to public inspection.

USTR will maintain a docket on this dispute settlement proceeding accessible to the public. The public file will include non-confidential comments received by USTR from the public with respect to the dispute; if a dispute settlement panel is convened or in the event of an appeal from such a panel, the U.S. submissions, any non-confidential submissions, or non-confidential summaries of submissions, received from other participants in the dispute; the report of the panel; and, if applicable, the report of the Appellate Body.

Comments will be placed in the docket and open to public inspection pursuant to 15 CFR 2006.13, except confidential business information exempt from public inspection in accordance with 15 CFR 2006.15 or information determined by USTR to be confidential in accordance with 19 U.S.C. 2155(g)(2). Comments open to public inspection may be viewed on the *www.regulations.gov* Web site.

Daniel Brinza,

Assistant United States Trade Representative for Monitoring and Enforcement.

[FR Doc. E9–29123 Filed 12–7–09; 8:45 am]

BILLING CODE 3190–WO–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Environmental Impact Statement, San Diego County, CA

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of withdrawal.

SUMMARY: The FHWA is issuing this notice to advise the public that the Notice of Intent to prepare an Environmental Impact Statement (EIS) for the proposed Interstate I–805 Managed Lanes South Project located in the cities of San Diego and Chula Vista in San Diego County (**Federal Register** Vol. 72, No 176; FR Doc E7–17912), California will be withdrawn, and an Environmental Assessment (EA) in lieu of an EIS is being prepared for this proposed highway project.

FOR FURTHER INFORMATION CONTACT: David Nagy, Chief, Environmental Branch B, California Department of Transportation—District 11, 4050 Taylor Street, San Diego, CA 92110, 619–688–0224, *David.L.Nagy@dot.ca.gov.*

SUPPLEMENTARY INFORMATION: The Federal Highway Administration (FHWA), on behalf of the California Department of Transportation (Caltrans), is advising the general public that Caltrans conducted studies of the potential environmental impacts associated with the proposed highway project. The I–805 Managed Lanes South Project is located in southern San Diego County, from just south of East Palomar Street, in the City of Chula Vista, continuing north through the I–805/SR–15 Freeway Interchange to Landis Street Overcrossing in the City of San Diego. The project proposes to construct buffer separated High Occupancy Vehicle/Transit lanes in the freeway median with auxiliary lanes at various points along the freeway. The project covers a distance of approximately 11.4 miles. Existing overcrossing and undercrossing structures within the project limits may be modified or replaced. Retaining walls will be placed along the route at appropriate locations to minimize right-of-way impacts. Noise barriers may also be placed at some locations within the project limits.

Additional transit features consist of in-line transit stations at H Street Overcrossing in the City of Chula Vista and at Plaza Boulevard Undercrossing in the City of National City as well as a direct access ramp (DAR) at East Palomar Street OC in the City of Chula Vista. Also included is an HOV/Transit direct connection ramp at SR–15.

The proposed DAR at East Palomar Street is also the southern terminus for the Managed Lanes Project. DARs will only be located on the north side of East Palomar Street. In the I–805 median, both northbound and southbound, four 12-ft PCC lanes will be constructed, two in each direction, separated by Type 60 concrete barrier. In each direction, 10-ft PCC inside shoulders will be adjacent to the concrete barrier. A 4-ft buffer will separate the HOV/Transit Lanes from the single occupancy lanes (main lanes).

Three alternatives, including the No-build Alternative, are being analyzed as part of the Draft EA. The alternatives are defined as follows: Alternative 1—construct buffer separated High Occupancy Vehicle/Transit lanes in the freeway median with auxiliary lanes; Alternative 2—proposes to construct only two HOV/Transit lanes between East Palomar Street and Telegraph Canyon Road, North of Telegraph Canyon Road, the proposed project would be identical to Alternative 1; Alternative 3—No-build Alternative.

The EA will be available for public inspection prior to the public meeting. Comments or questions concerning this proposed action and the determination that an EA is the proper environmental document should be directed to Caltrans at the address provided above.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Research Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Issued on: December 2, 2009.

David Tedrick,

Local Agency Programs Team Leader, South, Federal Highway Administration, Sacramento, California.

[FR Doc. E9–29185 Filed 12–7–09; 8:45 am]

BILLING CODE 4910–RY–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Passenger Facility Charge (PFC) Approvals and Disapprovals

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Monthly Notice of PFC Approvals and Disapprovals. In August 2009, there were five applications approved. Additionally, 21 approved amendments to previously approved applications are listed.

SUMMARY: The FAA publishes a monthly notice, as appropriate, of PFC approvals and disapprovals under the provisions of the Aviation Safety and Capacity Expansion Act of 1990 (Title IX of the Omnibus Budget Reconciliation Act of 1990) (Pub. L. 101–508) and Part 158 of the Federal Aviation Regulations (14 CFR Part 158). This notice is published pursuant to paragraph d of § 158.29.

PFC Applications Approved

Public Agency: Counties of Lackawanna and Luzerne, Avoca, Pennsylvania.

Application Number: 09–06–U–00–AVP.

Application Type: Use PFC revenue.

PFC Level: $4.50.

Total PFC Revenue Approved for Use in this Decision: $868,293.

Charge Effective Date: April 1, 2011.

Estimated Charge Expiration Date: August 1, 2017.

Class of Air Carriers Not Required To Collect PFCs:

No change from previous decision.

Brief Description of Project Approved for Use: Rehabilitate general aviation and old terminal apron.

Decision Date: August 2, 2009.

For Further Information Contact: Lori Ledebohm, Harrisburg Airports District Office, (717) 730–2835.

Public Agency: Jackson Hole Airport Board, Jackson, Wyoming.

Application Number: 09–12–C–00–JAC.

Application Type: Impose and use a PFC.

PFC Level: $4.50.

Total PFC Revenue Approved in This Decision: $12,896,731.

Earliest Charge Effective Date: September 1, 2012.

Estimated Charge Expiration Date: June 1, 2026.

Class of Air Carriers Not Required To Collect PFCs: None.

Brief Description of Projects Approved for Collection and Use:

Terminal rehabilitation and expansion.

Master plan update.

PFC application development cost.

Decision Date: August 3, 2009.

For Further Information Contact: Chris Schaffer, Denver Airports District Office, (303) 342–1258.

Public Agency: County of Emmet, Peliston, Michigan.

Application Number: 09–11–C–00–PLN.

Application Type: Impose and use a PFC.

Total PFC Revenue Approved in This Decision: $135,224.

PFC Level: $4.50.

Earliest Charge Effective Date: July 1, 2013.

Estimated Charge Expiration Date: October 1, 2014.

Class of Air Carriers Not Required To Collect PFCs:

Non-scheduled/on-demand air taxi operators filing FAA Form 1800–31.

Determination: Approved. Based on information contained in the public agency's application, the FAA has determined that the proposed class accounts for less than 1 percent of the total annual enplanements at Pellston Regional Airport.

Brief Description of Projects Approved for Collection and Use:

Property acquisition (Brill property).

PFC administration.

Acquire friction tester and pickup truck.

Airfield pavement marking.

Decision Date: August 10, 2009.

For Further Information Contact: Irene Porter, Detroit Airports District Office, (734) 229–2915.

Public Agency: Port of Bellingham, Bellingham, Washington.

Application Number: 09–10–U–00–BLI.

Application Type: Use PFC revenue.

PFC Level: $4.50.

Total PFC Revenue Approved for Use in This Decision: $875,000.

Charge Effective Date: July 1, 2008.

Estimated Charge Expiration Date: July 1, 2010.

Class of Air Carriers Not Required To Collect PFCs:

No change from previous decision.

Brief Description of Project Approved for Use:

Plans and specifications for terminal rehabilitation.

Decision Date: August 18, 2009.

For Further Information Contact: Trang Tran, Seattle Airports District Office, (425) 227–1662.

Public Agency: City of Kearney, Nebraska.

Application Number: 09–03–C–00–EAR.

Application Type: Impose and use a PFC.

Total PFC Revenue Approved in This Decision: $77,707.

PFC Level: $4.50.

Earliest Charge Effective Date: October 1, 2009.

Estimated Charge Expiration Date: July 1, 2011.

Class of Air Carriers Not Required To Collect PFCs: None.

Brief Description of Projects Approved for Collection and Use:

Aviation easement acquisition.

Master plan and airport layout plan update.

Runway and taxiway pavement maintenance.

Snow plow.

Terminal parking lot resurfacing.

Decision Date: August 21, 2009.

For Further Information Contact: Nicoletta Oliver, Central Region Airports Division, (816) 329–2642.

AMENDMENTS TO PFC APPROVALS

Amendment No., city, state	Amendment approved date	Original approved net PFC revenue	Amended approved net PFC revenue	Original estimated charge exp. date	Amended estimated charge exp. date
05–10–C–06–MCO, Orlando, FL	07/22/09	$509,842,236	$765,494,011	12/01/00	04/01/20
98–02–C–02–PWM, Portland, ME	07/22/09	8,485,479	6,986,461	02/01/04	02/01/04
93–02–I–05–BDL, Windsor Locks, CT	07/24/09	28,115,880	8,607,831	11/01/98	12/01/95
94–03–U–01–BDL, Windsor Locks, CT	07/24/09	NA	NA	11/01/98	12/01/95
96–05–U–01–BDL, Windsor Locks, CT	07/24/09	NA	NA	11/01/98	12/01/95
03–09–C–01–MRY, Monterey, CA	07/27/09	688,938	681,377	06/01/04	06/01/04
04–10–C–01–MRY, Monterey, CA	07/27/09	344,701	340,364	03/01/05	03/01/05
05–11–C–01–MRY, Monterey, CA	07/27/09	1,166,290	1,133,416	05/01/07	04/01/06
06–12–C–02–MRY, Monterey, CA	07/27/09	2,153,658	1,886,919	08/01/08	08/01/08

AMENDMENTS TO PFC APPROVALS—Continued

Amendment No., city, state	Amendment approved date	Original approved net PFC revenue	Amended approved net PFC revenue	Original estimated charge exp. date	Amended estimated charge exp. date
01–04–C–02–ISP, Islip, NY	08/03/09	444,546	189,654	08/01/05	06/01/05
03–05–C–01–ISP, Islip, NY	08/03/09	493,001	457,810	10/01/05	08/01/05
08–05–C–01–AVP, Avoca, PA	08/05/09	6,888,604	6,770,104	08/01/17	08/01/17
*00–02–C–01–PDT, Pendleton, OR	08/11/09	303,739	303,739	01/01/12	03/01/15
08–08–C–01–EAT, East Wenatchee, WA	08/11/09	365,332	366,393	02/01/10	02/01/10
98–04–C–06–SEA, Seattle, WA	08/12/09	797,275,000	963,656,707	06/01/14	09/01/18
01–04–C–02–RNO, Reno, NV	08/14/09	6,764,380	7,258,689	06/01/02	06/01/02
03–07–C–03–RNO, Reno, NV	08/14/09	5,556,400	1,852,373	12/01/04	12/01/04
99–04–C–02–OTH, North Bend, OR	08/18/09	164,500	119,853	05/01/03	05/01/03
01–05–C–04–OTH, North Bend, OR	08/18/09	473,096	425,008	07/01/06	07/01/06
03–06–C–01–OTH, North Bend, OR	08/18/09	287,000	282,373	02/01/09	11/01/07
07–06–C–02–BUF, Buffalo, NY	08/25/09	75,389,056	77,745,807	10/01/09	11/01/12

Notes: The amendment denoted by an asterisk (*) includes a change to the PEG level charged from $4.50 per enplaned passenger to $3.00 per enplaned passenger. For Pendleton, OR this change is effective on October 1, 2009.

Issued in Washington, DC, on Dec 02 2009.

Joe Hebert,

Manager, Financial Analysis and Passenger Facility Charge Branch.

[FR Doc. E9–29061 Filed 12–7–09; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF THE TREASURY

Office of the Assistant Secretary for International Affairs; Survey of U.S. Ownership of Foreign Securities as of December 31, 2009

AGENCY: Departmental Offices, Department of the Treasury.

ACTION: Notice of reporting requirements.

SUMMARY: By this Notice and in accordance with 31 CFR 129, the Department of the Treasury is informing the public that it is conducting a mandatory survey of U.S. ownership of foreign securities as of December 31, 2009. This Notice constitutes legal notification to all United States persons (defined below) who meet the reporting requirements set forth in this Notice that they must respond to, and comply with, this survey. Additional copies of the reporting form SHCA (2009) and instructions may be printed from the Internet at: *http://www.treas.gov/tic/forms-sh.html.*

Definition: Pursuant to 22 U.S.C. 3102 a United States person is any individual, branch, partnership, associated group, association, estate, trust, corporation, or other organization (whether or not organized under the laws of any State), and any government (including a foreign government, the United States Government, a State or local government, and any agency, corporation, financial institution, or other entity or instrumentality thereof, including a government-sponsored agency), who resides in the United States or is subject to the jurisdiction of the United States.

Who Must Report: The panel for this survey is based upon the level of U.S. holdings of foreign securities reported on the December 2006 benchmark survey of U.S. holdings of foreign securities, and will consist primarily of the largest reporters on that survey. Entities required to report will be contacted individually by the Federal Reserve Bank of New York. Entities not contacted by the Federal Reserve Bank of New York have no reporting responsibilities.

What To Report: This report will collect information on holdings by U.S. residents of foreign securities, including equities, long-term debt securities, and short-term debt securities (including selected money market instruments).

How To Report: Copies of the survey forms and instructions, which contain complete information on reporting procedures and definitions, can be obtained at the Web site address given above in the **SUMMARY,** or by contacting the survey staff of the Federal Reserve Bank of New York at (212) 720–6300, e-mail: *SHC.help@frb.org.* The mailing address is: Federal Reserve Bank of New York, Statistics Function, 4th Floor, 33 Liberty Street, New York, NY 10045–0001. Inquiries can also be made to Dwight Wolkow at (202) 622–1276, e-mail: *comments2TIC@treas.gov.*

When To Report: Data must be submitted to the Federal Reserve Bank of New York, acting as fiscal agent for the Department of the Treasury, by March 5, 2010.

Paperwork Reduction Act Notice: This data collection has been approved by the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act and assigned control number 1505–0146. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by OMB. The estimated average annual burden associated with this collection of information is 48 hours per respondent for end-investors and custodians that file Schedule 3 reports covering their securities entrusted to U.S. resident custodians, 145 hours per respondent for large end-investors filing Schedule 2 reports, and 700 hours per respondent for large custodians of securities filing Schedule 2 reports. Comments concerning the accuracy of this burden estimate and suggestions for reducing this burden should be directed to the Department of the Treasury, Attention: Administrator, International Portfolio Investment Data Reporting Systems, Room 5422, Washington, DC 20220, and to OMB, Attention: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503.

Dwight Wolkow,

Administrator, International Portfolio Investment Data Reporting Systems.

[FR Doc. E9–29121 Filed 12–7–09; 8:45 am]

BILLING CODE 4810–25–P

Federal Register

Tuesday,

December 8, 2009

Part II

Environmental Protection Agency

40 CFR Parts 50, 53, and 58

Primary National Ambient Air Quality Standard for Sulfur Dioxide; Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 50, 53, and 58

[EPA–HQ–OAR–2007–0352; FRL–8984–3]

RIN 2060–A048

Primary National Ambient Air Quality Standard for Sulfur Dioxide

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: Based on its review of the air quality criteria for oxides of sulfur and the primary national ambient air quality standard (NAAQS) for oxides of sulfur as measured by sulfur dioxide (SO_2), EPA is proposing to revise the primary SO_2 NAAQS to provide requisite protection of public health with an adequate margin of safety. Specifically, EPA proposes to establish a new 1-hour SO_2 standard within the range of 50–100 parts per billion (ppb), based on the 3-year average of the annual 99th percentile (or 4th highest) of 1-hour daily maximum concentrations. The EPA also proposes to revoke both the existing 24-hour and annual primary SO_2 standards.

DATES: Comments must be received on or before February 8, 2010. Under the Paperwork Reduction Act, comments on the information collection provisions must be received by OMB on or before January 7, 2010.

Public Hearings: A public hearing is scheduled for this proposed rule. The public hearing will be held on January 5, 2010 in Atlanta, Georgia.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2007–0352 by one of the following methods:

- *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *E-mail: a-and-r-Docket@epa.gov.*
- *Fax:* 202–566–9744.
- *Mail:* Docket No. EPA–HQ–OAR–2007–0352, Environmental Protection Agency, Mail Code 6102T, 1200 Pennsylvania Ave., NW., Washington, DC 20460. Please include a total of two copies.
- *Hand Delivery:* Docket No. EPA–HQ–OAR–2007–0352, Environmental Protection Agency, EPA West, Room 3334, 1301 Constitution Ave., NW, Washington, DC. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Public Hearings: A public hearing is scheduled for this proposed rule. The public hearing will be held on January 5, 2010 in Atlanta, Georgia. The hearing will be held at the following location: Sam Nunn Atlanta Federal Center, Conference Rooms B and C, 61 Forsyth Street, SW., Atlanta, GA 30303, Telephone: (404) 562–9077.

Note: All persons entering the Atlanta Federal Center must have a valid picture ID such as a Driver's License and go through Federal security procedures. All persons must go through a magnetometer and all personal items must go through x-ray equipment, similar to airport security procedures. After passing through the equipment, all persons must sign in at the guard station and show their picture ID.

See the **SUPPLEMENTARY INFORMATION** under ''Public Hearing'' for further information.

Instructions: Direct your comments to Docket ID No. EPA–HQ–OAR–2007–0352. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or e-mail. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *www.regulations.gov* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

Docket: All documents in the docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the Air and Radiation Docket and Information Center, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744 and the telephone number for the Air and Radiation Docket and Information Center is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: Dr. Michael J. Stewart, Health and Environmental Impacts Division, Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Mail Code C504–06, Research Triangle Park, NC 27711; telephone: 919–541–7524; fax: 919–541–0237; e-mail: *stewart.michael@epa.gov.*

SUPPLEMENTARY INFORMATION:

General Information

What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through *www.regulations.gov* or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for Preparing Your Comments.* When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
- Follow directions—the agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
- Explain why you agree or disagree, suggest alternatives, and substitute language for your requested changes.

- Describe any assumptions and provide any technical information and/or data that you used.
- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
- Make sure to submit your comments by the comment period deadline identified.

Availability of Related Information

A number of the documents that are relevant to this rulemaking are available through EPA's Office of Air Quality Planning and Standards (OAQPS) Technology Transfer Network (TTN) Web site at *http://www.epa.gov/ttn/naaqs/standards/so2/s_so2_index.html.* These documents include the Integrated Review Plan and the Health Assessment Plan, available at, the Integrated Science Assessment (ISA), available at *http://www.epa.gov/ttn/naaqs/standards/so2/s_so2_cr_isa.html,* and the Risk and Exposure Assessment (REA), available at *http://www.epa.gov/ttn/naaqs/standards/so2/s_so2_cr_rea.html.* These and other related documents are also available for inspection and copying in the EPA docket identified above.

Public Hearing

The public hearing on January 5, 2010 will provide interested parties the opportunity to present data, views, or arguments concerning the proposed rule. The EPA may ask clarifying questions during the oral presentations, but will not respond to the presentations at that time. Written statements and supporting information submitted during the comment period will be considered with the same weight as any oral comments and supporting information presented at the public hearing. Written comments must be received by the last day of the comment period, as specified in this proposed rulemaking.

The public hearing will begin at 10 a.m. and continue until 7 p.m. (local time) or later, if necessary, depending on the number of speakers wishing to participate. The EPA will make every effort to accommodate all speakers that arrive and register before 7 p.m. A lunch break is scheduled from 12:30 p.m. until 2 p.m.

If you would like to present oral testimony at the hearing, please notify Ms. Tricia Crabtree (C504–02), U.S. EPA, Research Triangle Park, NC 27711. The preferred method for registering is by e-mail (*crabtree.tricia@epa.gov*). Ms. Crabtree may be reached by telephone at (919) 541–5688. She will arrange a general time slot for you to speak. The EPA will make every effort to follow the schedule as closely as possible on the day of the hearing.

Oral testimony will be limited to five (5) minutes for each commenter to address the proposal. We will not be providing equipment for commenters to show overhead slides or make computerized slide presentations unless we receive special requests in advance. Commenters should notify Ms. Crabtree if they will need specific audiovisual (AV) equipment. Commenters should also notify Ms. Crabtree if they need specific translation services for non-English speaking commenters. The EPA encourages commenters to provide written versions of their oral testimonies either electronically on computer disk, CD–ROM, or in paper copy.

The hearing schedule, including lists of speakers, will be posted on EPA's Web site for the proposal at *http://www.epa.gov/ttn/naaqs/standards/so2/s_so2_index.html* prior to the hearing. Verbatim transcripts of the hearing and written statements will be included in the rulemaking docket.

Table of Contents

The following topics are discussed in this preamble:

I. Background

A. Legislative requirements

Two sections of the Clean Air Act (Act or CAA) govern the establishment and revision of National Ambient Air Quality Standards NAAQS. Section 108 of the Act directs the Administrator to identify and list air pollutants that meet certain criteria, including that the air pollutant ''in his judgment, cause[s] or contribute[s] to air pollution which may reasonably be anticipated to endanger public health and welfare'' and ''the presence of which in the ambient air results from numerous or diverse mobile or stationary sources.'' CAA section 108 (a)(1)(A) & (B). For those air pollutants listed, section 108 requires the Administrator to issue air quality criteria that ''accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of [a] pollutant in ambient air * * *'' Section 108 (a) (2).

Section 109(a) of the Act directs the Administrator to promulgate ''primary'' and ''secondary'' NAAQS for pollutants for which air quality criteria have been issued. Section 109(b)(1) defines a primary standard as one ''the attainment and maintenance of which in the judgment of the Administrator, based on [the air quality] criteria and allowing an adequate margin of safety, are requisite to protect the public health.'' [1] Section 109(b)(1). A secondary standard, in turn, must ''specify a level of air quality the attainment and maintenance of which, in the judgment of the Administrator, based on [the air quality] criteria, is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such pollutant in the ambient air.'' [2] Section 109(b)(2) This proposal concerns exclusively the primary NAAQS for oxides of sulfur.

The requirement that primary standards include an adequate margin of safety is intended to address uncertainties associated with inconclusive scientific and technical information available at the time of standard setting. It is also intended to provide a reasonable degree of protection against hazards that research has not yet identified. *Lead Industries Association* v. *EPA,* 647 F.2d 1130, 1154 (DC Cir 1980), *cert. denied,* 449 U.S. 1042 (1980); *American Petroleum Institute* v. *Costle,* 665 F.2d 1176, 1186 (DC Cir. 1981), *cert. denied,* 455 U.S. 1034 (1982). Both kinds of uncertainties are components of the risk associated with pollution at levels below those at which human health effects can be said to occur with reasonable scientific certainty. Thus, in selecting primary standards that include an adequate margin of safety, the Administrator is seeking not only to prevent pollution levels that have been demonstrated to be harmful but also to prevent lower pollutant levels that may pose an unacceptable risk of harm, even if the risk is not precisely identified as to nature or degree.

In addressing the requirement for a margin of safety, EPA considers such factors as the nature and severity of the health effects involved, the size of the at-risk population(s), and the kind and degree of the uncertainties that must be addressed. The selection of any particular approach to providing an adequate margin of safety is a policy choice left specifically to the Administrator's judgment. *Lead Industries Association* v. *EPA,* 647 F.2d at 1161–62.

In setting standards that are ''requisite'' to protect public health and welfare, as provided in section 109(b), EPA's task is to establish standards that are neither more nor less stringent than necessary for these purposes. In so doing, EPA may not consider the costs of implementing the standards. *Whitman v. American Trucking Associations,* 531 U.S. 457, 471, 475–76 (2001).

Section 109(d)(1) of the Act requires the Administrator to periodically undertake a thorough review of the air quality criteria published under section 108 and the NAAQS and to revise the criteria and standards as may be appropriate. The Act also requires the Administrator to appoint an independent scientific review committee composed of seven members, including at least one member of the National Academy of Sciences, one physician, and one person representing State air pollution control agencies, to review the air quality criteria and NAAQS and to ''recommend to the Administrator any new * * * standards and revisions of existing criteria and standards as may be appropriate under section 108 and subsection (b) of this section.'' CAA section 109 (d)(2). This independent review function is performed by the Clean Air Scientific Advisory Committee (CASAC) of EPA's Science Advisory Board.

B. Related SO_2 control programs

States are primarily responsible for ensuring attainment and maintenance of ambient air quality standards once EPA has established them. Under section 110 of the Act, and related provisions, States are to submit, for EPA approval, State implementation plans (SIPs) that provide for the attainment and maintenance of such standards through control programs directed to sources of the pollutants involved. The States, in conjunction with EPA, also administer the prevention of significant deterioration program that covers these

[1] The legislative history of section 109 indicates that a primary standard is to be set at ''the maximum permissible ambient air level * * * which will protect the health of any [sensitive] group of the population,'' and that for this purpose ''reference should be made to a representative sample of persons comprising the sensitive group rather than to a single person in such a group.'' S. Rep. No. 91–1196, 91st Cong., 2d Sess. 10 (1970).

[2] EPA is currently conducting a separate review of the secondary SO_2 NAAQS jointly with a review of the secondary NO_2 NAAQS (see *http://www.epa.gov/ttn/naaqs/standards/no2so2sec/index.html* for more information).

pollutants. See CAA sections 160–169. In addition, Federal programs provide for nationwide reductions in emissions of these and other air pollutants through the Federal motor vehicle and motor vehicle fuel control program under title II of the Act, (CAA sections 202–250) which involves controls for emissions from all moving sources and controls for the fuels used by these sources; new source performance standards under section 111; and title IV of the Act (CAA sections 402–416), which specifically provides for major reductions in SO_2 emissions. EPA has also promulgated the Clean Air Interstate Rule (CAIR) to define additional SO_2 emission reductions needed in the Eastern United States to address the interstate impact provisions of CAA section 110(a)(2)(D), a rule which EPA is reevaluating pursuant to court remand.

Currently, there are several areas designated as being in nonattainment of the primary SO_2 NAAQS (see section VI). If the SO_2 NAAQS is revised as a result of this review; however, some additional areas could be classified as non-attainment. Certain States would then be required to develop SIPs that identify and implement specific air pollution control measures to reduce ambient SO_2 concentrations to attain and maintain the revised SO_2 NAAQS, most likely by requiring air pollution controls on sources that emit oxides of sulfur (SO_X).

C. History of reviews of the primary NAAQS for sulfur oxides

On April 30, 1971, the EPA promulgated primary SO_2 NAAQS (36 FR 8187). These primary standards, which were based on the findings outlined in the original 1969 Air Quality Criteria for Sulfur Oxides, were set at 0.14 parts per million averaged over a 24-hour period, not to be exceeded more than once per year, and 0.030 ppm annual arithmetic mean. In 1982, EPA published the Air Quality Criteria for Particulate Matter and Sulfur Oxides (EPA, 1982) along with an addendum of newly published controlled human exposure studies, which updated the scientific criteria upon which the initial standards were based (EPA, 1982). In 1986, EPA published a second addendum presenting newly available evidence from epidemiologic and controlled human exposure studies (EPA, 1986). In 1988, EPA published a proposed decision not to revise the existing standards (53 FR 14926) (April 26, 1988). However, EPA specifically requested public comment on the alternative of revising the current standards and adding a new 1-hour primary standard of 0.4 ppm (400 ppb) to protect against 5–10 minute peak SO_2 concentrations.

As a result of public comments on the 1988 proposal and other post-proposal developments, EPA published a second proposal on November 15, 1994 (59 FR 58958). The 1994 re-proposal was based in part on a supplement to the second addendum of the criteria document, which evaluated new findings on 5–10 minute SO_2 exposures in asthmatics (EPA, 1994a). As in the 1988 proposal, EPA proposed to retain the existing 24-hour and annual standards. EPA also solicited comment on three regulatory alternatives to further reduce the health risk posed by exposure to high 5-minute peaks of SO_2 if additional protection were judged to be necessary. The three alternatives were: (1) Revising the existing primary SO_2 NAAQS by adding a new 5-minute standard of 0.6 ppm (600 ppb) SO_2; (2) establishing a new regulatory program under section 303 of the Act to supplement protection provided by the existing NAAQS, with a trigger level of 0.6 ppm (600 ppb) SO_2, one expected exceedance; and (3) augmenting implementation of existing standards by focusing on those sources or source types likely to produce high 5-minute peak concentrations of SO_2.

On May 22, 1996, EPA announced its final decision not to revise the NAAQS for SO_X (61 FR 25566). EPA found that asthmatics (a susceptible population group) could be exposed to such short-term SO_2 bursts resulting in repeated 'exposure events' such that tens or hundreds of thousands of asthmatics could be exposed annually to lung function effects ''distinctly exceeding * * * [the] typical daily variation in lung function'' that asthmatics routinely experience, and found further that repeated occurrences should be regarded as significant from a public health standpoint. 61 FR at 25572, 25573. Nonetheless, the agency concluded that ''the likelihood that asthmatic individuals will be exposed * * * is very low when viewed from a national perspective'', that ''5-minute peak SO[2] levels do not pose a broad public health problem when viewed from a national perspective'', and that ''short-term peak concentrations of SO[2] do not constitute the type of ubiquitous public health problem for which establishing a NAAQS would be appropriate.'' Id. at 25575. EPA concluded, therefore, that it would not revise the existing standards or add a standard to specifically address 5-minute exposures. EPA also announced an intention to propose guidance, under section 303 of the Act, to assist states in responding to short-term peak of SO_2 and later initiated a rulemaking to do so (62 FR 210 (Jan. 2, 1997).

The American Lung Association and the Environmental Defense Fund challenged EPA's decision not to establish a 5-minute standard. On January 30, 1998, the Court of Appeals for the District of Columbia found that EPA had failed to adequately explain its determination that no revision to the SO_2 NAAQS was appropriate and remanded the determination back to EPA for further explanation. *American Lung Ass'n* v. *EPA,* 134 F. 3d 388 (DC Cir. 1998). Specifically, the court held that EPA had failed to adequately explain the basis for its conclusion that short-term SO_2 exposures to asthmatics do not constitute a public health problem, noting that the agency had failed to explain the link between its finding that repeated short-term exposures were significant, and that there would be tens to hundreds of thousands of such exposures annually to a susceptible subpopulation, but that a NAAQS was found not be appropriate. 134 F. 3d at 392. The court also rejected the explanation that short-term SO_2 bursts were ''localized, infrequent, and site-specific'' as a rational basis for the conclusion that no public health problem existed: ''[N]othing in the Final Decision explains why 'localized', 'site-specific', or even 'infrequent' events might nevertheless create a public health problem, particularly since, in some sense, all pollution is local and site-specific * * *''. *Id.* The court accordingly remanded the case to EPA to adequately explain its determination or otherwise take action in accordance with the opinion. In response, EPA has collected and analyzed additional air quality data focused on 5-minute concentrations of SO_2. These air quality analyses conducted since the last review will help inform the current review, which will address the issues raised in the court's remand of the Agency's last decision.

EPA formally initiated the current review of the air quality criteria for oxides of sulfur and the SO_2 primary NAAQS on May 15, 2006 (71 FR 28023) with a general call for information. EPA's draft Integrated Review Plan for the Primary National Ambient Air Quality Standards for Sulfur Dioxide (EPA, 2007a) was made available in April 2007 for public comment and was discussed by the CASAC via a publicly accessible teleconference on May 11, 2007. As noted in that plan, SO_X includes multiple gaseous (*e.g.,* SO_3) and particulate (*e.g.,* sulfate) species. Because the health effects associated with particulate species of SO_x have been considered within the context of

the health effects of ambient particles in the Agency's review of the NAAQS for particulate matter (PM), the current review of the primary SO_2 NAAQS is focused on the gaseous species of SO_x and does not consider health effects directly associated with particulate species.

The first draft of the Integrated Science Assessment for Oxides of Sulfur-Health Criteria (ISA) and the Sulfur Dioxide Health Assessment Plan: Scope and Methods for Exposure and Risk Assessment (EPA, 2007b) were reviewed by CASAC at a public meeting held on December 5–6, 2007. Based on comments received from CASAC and the public, EPA developed the second draft of the ISA and the first draft of the Risk and Exposure Assessment to Support the Review of the SO_2 Primary National Ambient Air Quality Standard (Risk and Exposure Assessment (REA)). These documents were reviewed by CASAC at a public meeting held on July 30–31, 2008. Based on comments received from CASAC and the public at this meeting, EPA released the final ISA in September of 2008 (EPA, 2008a; henceforth referred to as ISA). In addition, comments received were considered in developing the second draft of the REA. Importantly, the second draft of the REA contained a draft staff policy assessment that considered the evidence presented in the final ISA and the air quality, exposure, and risk characterization results presented in the second draft REA, as they related to the adequacy of the current SO_2 NAAQS and potential alternative primary SO_2 standards. This document was reviewed by CASAC at a public meeting held on April 16–17, 2009. In preparing the final REA report, which included the final staff policy assessment, EPA considered comments received from CASAC and the public at and subsequent to that meeting. The final REA containing the final staff policy assessment was completed in August 2009 (EPA 2009a; henceforth referred to as REA).

The schedule for completion of this review is governed by a judicial order resolving a lawsuit filed in September 2005, concerning the timing of the current review. *Center for Biologic Diversity* v. *Johnson* (Civ. No. 05–1814) (D.D.C. 2007). The order that now governs this review, entered by the court in August 2007 and amended in December 2008, provides that the Administrator will sign, for publication, notices of proposed and final rulemaking concerning the review of the primary SO_2 NAAQS no later than November 16, 2009 and June 2, 2010, respectively.

This action presents the Administrator's proposed decisions on the current primary SO_2 standards. Throughout this preamble a number of conclusions, findings, and determinations proposed by the Administrator are noted. Although they identify the reasoning that supports this proposal, they are not intended to be final or conclusive. EPA invites general, specific, and/or technical comments on all issues involved with this proposal, including all such proposed judgments, conclusions, findings, and determinations. In addition to requesting comment on the overall approach, EPA invites specific comment on the level, or range of levels, appropriate for such a standard, as well as on the rationale that would support that level or range of levels.

II. Rationale for proposed decisions on the primary standards

This section presents the rationale for the Administrator's proposed decision to revise the existing SO_2 primary standards by replacing the current 24-hour and annual standards with a 1-hour standard and to specify this 1-hour standard to the nearest parts per billion (ppb). As discussed more fully below, this rationale takes into account: (1) Judgments and conclusions presented in the ISA and the REA; (2) CASAC advice and recommendations, as reflected in the CASAC panel's discussions of drafts of the ISA and REA at public meetings, in separate written comments, and in CASAC letters to the Administrator (Henderson 2008; Samet, 2009); and (3) public comments received at CASAC meetings during the development of the ISA and the REA.

In developing this rationale, EPA has drawn upon an integrative synthesis of the entire body of evidence on human health effects associated with the presence of SO_2 in the ambient air, and upon the results of quantitative exposure and risk assessments reflecting this evidence. As discussed below, this body of evidence addresses a broad range of health endpoints associated with exposure to SO_2 in the ambient air. In considering this entire body of evidence, EPA chose to focus in particular on those health endpoints for which the ISA finds associations with SO_2 to be causal or likely causal (see section II.B below). Thus, the focus of this proposal will be on respiratory morbidity following short-term (5 minutes to 24 hours) exposure to SO_2, for which the ISA found a causal relationship.

As discussed below, a substantial amount of new research has been conducted since EPA's last review of the SO_2 NAAQS, with important new information coming from epidemiologic studies in particular. The newly available research studies evaluated in the ISA have undergone intensive scrutiny through multiple layers of peer review and opportunities for public review and comment. Although important uncertainties remain in the qualitative and quantitative characterizations of health effects attributable to exposure to ambient SO_2, the review of this information has been extensive and deliberate.

The remainder of this section discusses the Administrator's rationale for the proposed decisions on the primary standard. Section II.A presents a discussion of the principal emitting sources and current patterns of SO_2 air quality, as well as the current SO_2 monitoring network from which those air quality patterns are obtained. Section II.B includes an overview of the scientific evidence related to the respiratory effects associated with ambient SO_2 exposure. This overview includes a discussion of the at-risk populations considered in the ISA. Section II.C discusses the approaches taken by EPA to assess exposures and health risks associated with exposure to ambient SO_2, including a discussion of key uncertainties associated with the analyses. Section II.D presents the approach that is being used in the current review of the SO_2 NAAQS with regard to consideration of the scientific evidence and the air quality, exposure, and risk-based results related to the adequacy of the current standards and potential alternative standards. Sections II.E and II.F discuss the scientific evidence and the air quality, exposure, and risk-based results specifically as they relate to the current and potential alternative standards, including discussion of the Administrator's proposed decisions on the standards. Section II.G summarizes the Administrator's proposed decisions with regard to the SO_2 primary NAAQS.

A. Characterization of SO_2 air quality

1. Anthropogenic sources and current patterns of SO_2 Air Quality

Anthropogenic SO_2 emissions originate chiefly from point sources, with fossil fuel combustion at electric utilities (~66%) and other industrial facilities (~29%) accounting for the majority of total emissions (ISA, section 2.1). Other anthropogenic sources of SO_2 include both the extraction of metal from ore as well as the burning of high sulfur-containing fuels by locomotives, large ships, and equipment utilizing diesel engines. SO_2 emissions and

ambient concentrations follow a strong east to west gradient due to the large numbers of coal-fired electric generating units in the Ohio River Valley and upper Southeast regions. In the 12 Consolidated Metropolitan Statistical Areas (CMSAs) that had at least four SO_2 regulatory monitors from 2003–2005, 24-hour average concentrations in the continental U.S. ranged from a reported low of ~1 ppb in Riverside, CA and San Francisco, CA to a high of ~12 ppb in Pittsburgh, PA and Steubenville, OH (ISA, section 2.5.1). In addition, outside or inside all CMSAs from 2003–2005, the annual average SO_2 concentration was 4 ppb (ISA, Table 2–8). However, spikes in hourly concentrations occurred; the mean 1-hour maximum concentration outside or inside CMSAs was 13 ppb, with a maximum value of greater than 600 ppb outside CMSAs and greater than 700 ppb inside CMSAs (ISA, Table 2–8).

Temporal and spatial patterns of 5-minute peaks of SO_2 are also important given that human clinical studies have demonstrated that exposure to these peaks can result in adverse respiratory effects in exercising asthmatics (see section II.B). For those monitors which voluntarily reported 5-minute block average data,[3] when maximum 5-minute concentrations were reported, the absolute highest concentration over the ten-year period exceeded 4000 ppb, but for all individual monitors, the 99th percentile was below 200 ppb (ISA, section 2.5.2 Table 2–10). Median concentrations from these monitors reporting 5-minute data ranged from 1 ppb to 8 ppb, and the average for each maximum 5-minute level ranged from 3 ppb to 17 ppb. Delaware, Pennsylvania, Louisiana, and West Virginia had mean values for maximum 5-minute data exceeding 10 ppb. Among aggregated within-state data for the 16 monitors from which all 5-minute average intervals were reported, the median values ranged from 1 ppb to 5 ppb, and the means ranged from 3 ppb to 11 ppb (ISA, section 2.5.2). The highest reported concentration was 921 ppb, but the 99th percentile values for aggregated within-state data were all below 90 ppb (ISA, section 2.5.2).

2. SO_2 monitoring

Although the SO_2 standard was established in 1971, uniform minimum monitoring requirements for SO_2 monitoring did not appear until May 1979. From the time of the implementation of the 1979 monitoring rule through 2008, the SO_2 network has steadily decreased in size from approximately 1496 sites in 1980 to the approximately 488 sites operating in 2008. At present, except for SO_2 monitoring required at National Core Monitoring Stations (NCore stations), there are no minimum monitoring requirements for SO_2 in 40 CFR part 58 Appendix D, other than a requirement for EPA Regional Administrator approval before removing any existing monitors and that any ongoing SO_2 monitoring must have at least one monitor sited to measure the maximum concentration of SO_2 in that area. EPA removed the specific minimum monitoring requirements for SO_2 in the 2006 monitoring rule revisions, based on the fact that there were no SO_2 nonattainment areas at that time, coupled with trends evidence showing an increasing gap between national average SO_2 concentrations and the current 24-hour and annual standards. Additionally, the minimum requirements were removed to provide State, local, and tribal air monitoring agencies flexibility in meeting higher priority monitoring needs for pollutants such as ozone and $PM_{2.5}$, or implementing the new multi-pollutant sites (NCore network) required by the 2006 rule revisions, by allowing them to discontinue lower priority monitoring. More information on SO_2 monitoring can be found in section III.

B. Health effects information

During the last review, EPA retained the current 24-hour and annual averaging times for the primary SO_2 NAAQS. The 24-hour NAAQS was largely based on epidemiologic studies that observed associations between 24-hour average SO_2 levels and adverse respiratory effects and daily mortality (EPA 1982, 1994a, 1994b). The annual standard was supported by a few epidemiologic studies that found an association between adverse respiratory effects and annual average SO_2 concentrations (EPA 1982, 1994a, 1994b). However, it was noted that in the locations where these epidemiologic studies were conducted, high SO_2 levels were usually accompanied by high levels of PM, thus making it difficult to disentangle the individual contribution each pollutant had on these health outcomes. Moreover, EPA noted that rather than 24-hour or annual average SO_2 levels, the health effects observed in these studies may have been related, at least in part, to the occurrence of shorter-term peaks of SO_2 within a 24-hour period (53 FR 14930; April 26, 1988).

In the current review, the ISA along with its associated annexes, provided a comprehensive review and assessment of the scientific evidence related to the health effects associated with SO_2 exposures. For these health effects, the ISA characterized judgments about causality with a hierarchy that contains five levels (ISA, section 1–3): sufficient to infer a causal relationship, sufficient to infer a likely causal relationship (*i.e.,* more likely than not), suggestive but not sufficient to infer a causal relationship, inadequate to infer the presence or absence of a causal relationship, and suggestive of no causal relationship. Judgments about causality were informed by a series of aspects that are based on those set forth by Sir Austin Bradford Hill in 1965 (ISA, Table 1–1). These aspects include strength of the observed association, availability of experimental evidence, consistency of the observed association, biological plausibility, coherence of the evidence, temporal relationship of the observed association, and the presence of an exposure-response relationship.

Judgments made in the ISA about the extent to which relationships between various health endpoints and exposure to SO_2 are likely causal have been informed by several factors. As discussed in the ISA in section 1.3, these factors include the nature of the evidence (*i.e.,* controlled human exposure, epidemiologic, and/or toxicological studies) and the weight of evidence. The weight of evidence takes into account such considerations as biological plausibility, coherence of the evidence, strength of associations, and consistency of the evidence. Controlled human exposure studies provide directly applicable information for determining causality because these studies are not limited by differences in dosimetry and species sensitivity, which would need to be addressed in extrapolating animal toxicology data to human health effects, and because they provide data relating health effects specifically to SO_2 exposures, in the absence of the co-occurring pollutants present in ambient air. Epidemiologic studies provide evidence of associations between SO_2 concentrations and more serious health endpoints (*e.g.,* hospital admissions and emergency department visits) that cannot be assessed in controlled human exposure studies. For these studies the degree of uncertainty introduced by confounding variables (*e.g.,* other pollutants) affects the level of confidence that the health effects being investigated are attributable to

[3] A small number of sites, 98 total from 1997 to 2007 of the approximately 500 SO_2 monitors, and not the same sites in all years, voluntarily reported 5-minute block average data to AQS (ISA, section 2.5.2). Of these, 16 reported all twelve 5-minute averages in each hour for at least part of the time between 1997 and 2007. The remainder reported only the maximum 5-minute average in each hour.

SO_2 exposures alone and/or in combination with co-occurring pollutants.

In using a weight of evidence approach to inform judgments about the degree of confidence that various health effects are likely to be caused by exposure to SO_2, confidence increases with the number of studies consistently reporting a particular health endpoint, with increasing support for the biological plausibility of the health effects, and with the strength and coherence of the evidence. Conclusions regarding biological plausibility, consistency, and coherence of evidence of SO_2-related health effects are drawn from the integration of epidemiologic studies with controlled human exposure studies and with mechanistic information from animal toxicological studies. As discussed below, the weight of evidence is strongest for respiratory morbidity endpoints (*e.g.,* lung function decrements, respiratory symptoms, hospital admissions, and emergency department visits) associated with short-term (5-minutes to 24-hours) exposure to ambient SO_2.

For epidemiologic studies, strength of association refers to the magnitude of the association and its statistical strength, which includes assessment of both effect estimate size and precision. In general, when associations yield large relative risk estimates, it is less likely that the association could be completely accounted for by a potential confounder or some other bias. Consistency refers to the persistent finding of an association between exposure and outcome in multiple studies of adequate power in different persons, places, circumstances and times.

Being mindful of the considerations discussed above, the ISA concluded that there was sufficient evidence to infer a causal relationship between respiratory morbidity and short-term (5-minutes to 24-hours) exposure to SO_2 (ISA, section 5.2). The ISA based this conclusion on the consistency, coherence, and plausibility of findings observed in controlled human exposure studies of 5–10 minutes, epidemiologic studies mostly using 1-hour daily maximum and 24-hour average SO_2 concentrations, and animal toxicological studies using exposures of minutes to hours (ISA, section 5.2). The ISA judged evidence of an association between SO_2 exposure and other health categories to be less convincing; other associations were judged to be suggestive but not sufficient to infer a causal relationship (*i.e.,* short-term exposure to SO_2 and mortality) or inadequate to infer the presence or absence of a causal relationship (*i.e.,* short-term exposure to SO_2 and cardiovascular morbidity, and long-term exposure to SO_2 and respiratory morbidity, other morbidity, and mortality). Key conclusions from the ISA are described in greater detail in Table 5–3 of the ISA.

As summarized above, the ISA found a ''causal'' association between short-term (5 minutes to 24 hour) exposure to SO_2 and respiratory morbidity. The evidence leading to this conclusion will be discussed throughout this section as well as in the context of the adequacy of the current and proposed alternative standards (see section II.E and II.F) The ISA also found ''suggestive but not sufficient'' evidence to infer a causal relationship between short-term SO_2 exposure and mortality. EPA considered this suggestive evidence within the context of proposing a new 1-hour averaging time (see section II.F.2). The association between short- and long-term SO_2 exposure and other health categories was found to be inadequate to infer the presence or absence of a causal relationship and thus, will not be discussed in detail in this notice.

Section II.B.1 discusses the results of controlled human exposure studies demonstrating respiratory effects in exercising asthmatics following 5–10 minute exposures to SO_2, and conclusions in the REA regarding the adversity of such effects. Section II.B.2 discusses the respiratory effects reported in U.S. epidemiologic studies of respiratory symptoms, as well as emergency department visits and hospital admissions for all respiratory causes and asthma. Section II.B.3 discusses ISA conclusions regarding short-term (5 minutes to 24-hours) exposure to SO_2 and respiratory effects, and section II.B.4 discusses long-term SO_2 exposure and potentially adverse health effects. Finally, section II.B.5 discusses SO_2-related impacts on public health.

1. Respiratory effects and 5–10 minute exposure to SO_2

As noted above, the ISA concluded that there was sufficient evidence to infer a causal relationship between respiratory morbidity and short-term (5-minutes to 24-hours) exposure to SO_2 (ISA, section 5.2). This determination was primarily based on controlled human exposure studies demonstrating a relationship between 5–10 minute peak SO_2 exposures and adverse effects on the respiratory system in exercising asthmatics. The ISA described the controlled human exposure results as being the ''definitive evidence'' for its causal finding (ISA, section 5.2; p. 5–2).

Since the last review, several additional controlled human exposure studies have been published that provide supportive evidence of SO_2-induced decrements in lung function and increases in respiratory symptoms among exercising asthmatics (see ISA, Annex Table D–2). However, based in part on recent guidance from the American Thoracic Society (ATS) regarding what constitutes an adverse health effect of air pollution (ATS, 2000), a much larger body of key older studies described in the prior review were analyzed in the ISA along with studies published since the last review. In their official statement, the ATS concluded that an air pollution-induced shift in a population distribution of a given health-related endpoint (*e.g.,* lung function) should be considered adverse, even if this shift does not result in the immediate occurrence of illness in any one individual in the population (ATS 2000). The ATS also recommended that transient loss in lung function with accompanying respiratory symptoms attributable to air pollution should be considered adverse. However, it was noted in the ISA that symptom perception is highly variable among asthmatics even during severe episodes of asthmatic bronchoconstriction, and that an asymptomatic decrease in lung function may pose a significant health risk to asthmatic individuals as it is less likely that these individuals will seek treatment (ISA, section 3.1.3). Therefore, whereas the conclusions in the prior review of the SO_2 NAAQS were based on SO_2 exposure concentrations which resulted in large decrements in lung function and moderate to severe respiratory symptoms, the ISA's current review of data from controlled human exposure studies focused on moderate to large SO_2-induced decrements in lung function and/or respiratory symptoms ranging from mild (perceptible wheeze or chest tightness) to severe (breathing distress requiring the use of a bronchodilator). See also section II.B.1.c below discussing adverse of effects. Key controlled human exposure studies of respiratory symptoms and lung function are described briefly below and in more detail in section 3.1.3 of the ISA.

a. Respiratory symptoms

Numerous free-breathing controlled human exposure studies have evaluated respiratory symptoms (*e.g.* cough, wheeze, or chest tightness) in exercising asthmatic following 5–10 minute SO_2 exposures. Linn *et al.* (1983) reported that 5-minute exposures to SO_2 levels as low as 400 ppb resulted in exercising asthmatics experiencing statistically significant increases in respiratory symptoms (*e.g.,* wheeze, chest tightness,

cough, substernal irritation). In a separate study, exercising asthmatics exhibited respiratory symptoms following a 10-minute exposure to 400–600 ppb SO_2 (Linn *et al.,* (1987); Smith (1993)). Gong *et al.,* (1995) exposed SO_2-sensitive asthmatics to 0, 500 and 1000 ppb SO_2 for 10 minutes while performing different levels of exercise (light, medium, or heavy) and reported that respiratory symptoms increased with increasing SO_2 concentrations. The authors further reported that exposure to 500 ppb SO_2 during light exercise evoked a more severe symptomatic response than heavy exercise in clean air.

In addition to these free breathing chamber results described above, studies using mouthpiece exposure systems have reported respiratory symptoms within minutes of SO_2 exposure.[4] Balmes *et al.* (1987) reported that 7 out of 8 exercising asthmatics developed respiratory symptoms following a 500 ppb 3-minute exposure to SO_2 via mouthpiece (ISA section 3.1.3.1). In an additional study, Trenga *et al.* (1999) reported increases in respiratory symptoms in exercising asthmatics following 10-minute exposures to 500 ppb SO_2. Although not directly comparable to the free-breathing chamber results described above, these mouthpiece exposure results nonetheless support an association between SO_2 exposure and respiratory symptoms.

b. Lung function decrements

The ISA found that in free-breathing chamber studies, asthmatic individuals exposed to SO_2 concentrations as low as 200–300 ppb for 5–10 minutes during exercise have been shown to experience moderate or greater bronchoconstriction, measured as a decrease in Forced Expiratory Volume in the first second (FEV_1) of ≥ 15%, or an increase in specific airway resistance (sRaw) of ≥ 100% after correction for exercise-induced responses in clean air (Bethel *et al.,* 1985; Linn *et al.,* 1983, 1987; 1988; 1990; Roger *et al.,* 1985).[5] In addition, the ISA concluded that among asthmatics, both the percentage of individuals affected, and the severity of the response increases with increasing SO_2 concentrations. That is, at concentrations ranging from 200–300 ppb, the lowest levels tested in free breathing chamber studies,[6] approximately 5–30% of exercising asthmatics experience moderate or greater decrements in lung function (ISA, Table 3–1). At concentrations of 400–600 ppb, moderate or greater decrements in lung function occur in approximately 20–60% of exercising asthmatics, and compared to exposures at 200–300 ppb, a larger percentage of asthmatics experience severe decrements in lung function (*i.e.,* ≥ 200% increase in sRaw, and/or a ≥ 20% decrease in FEV_1) (ISA, Table 3–1). The ISA also noted that at SO_2 concentrations ≥ 400 ppb, moderate or greater decrements in lung function are frequently accompanied by respiratory symptoms (*e.g.,* cough, wheeze, chest tightness, shortness of breath) (ISA, Table 3–1). Further analysis and discussion of the individual studies presented above can be found in Sections 3.1.1 to 3.1.3.5 of the ISA.

In addition to the evidence from free-breathing chamber studies, the ISA notes very limited evidence of decrements in lung function in exercising asthmatics exposed to lower levels of SO_2 via mouthpiece. That is, the ISA cites two studies where some exercising asthmatics had small changes in FEV_1 or sRaw following exposure to 100 ppb SO_2 via mouthpiece (Koenig *et al.,* 1990 and Sheppard *et al.,* 1981).

c. Adversity of 5–10 minute respiratory effects

The ATS has previously defined adverse respiratory health effects as ''medically significant physiologic changes generally evidenced by one or more of the following: (1) Interference with the normal activity of the affected person or persons, (2) episodic respiratory illness, (3) incapacitating illness, (4) permanent respiratory injury, and/or (5) progressive respiratory dysfunction'' (ATS 1985). The ATS has also recommended that transient loss in lung function with accompanying respiratory symptoms, or detectable effects of air pollution on clinical measures (*e.g.,* medication use) be considered adverse (ATS 1985). In addition, the REA noted that during the last O_3 NAAQS review, the Criteria Document (CD) and Staff Paper indicated that for many people with lung disease (*e.g.,* asthma), even moderate decrements in lung function (*e.g.,* FEV_1 decrements > 10% but < 20% and/or ≥ 100% increases in sRaw) or respiratory symptoms would likely interfere with normal activities and result in additional and more frequent use of medication (EPA 2006, EPA 2007d). The REA also noted that CASAC has previously indicated that in the context of standard setting, a focus on the lower end of the range of moderate functional responses is most appropriate for estimating potentially adverse lung function decrements in people with lung disease (73 FR16463). Finally, the REA noted that in the current SO_2 NAAQS review, clinicians on the CASAC Panel again advised that moderate or greater decrements in lung function can be clinically significant in some individuals with respiratory disease (hearing transcripts from USEPA Clean Air Scientific Advisory Committee (CASAC), July 30–31, 2008, Sulfur Oxides-Health Criteria (part 3 of 4) pages 211–213).[7]

As previously mentioned, the ATS published updated guidelines on what constitutes an adverse health effect of air pollution in 2000 (ATS, 2000). Among other considerations, the 2000 guidelines stated that measurable negative effects of air pollution on quality of life should be considered adverse (ATS 2000). These updated guidelines also indicated that exposure to air pollution that increases the risk of an adverse effect to the entire population is adverse, even though it may not increase the risk of any individual to an unacceptable level (ATS 2000). For example, a population of asthmatics could have a distribution of lung function such that no individual has a level associated with significant impairment. Exposure to air pollution could shift the distribution to lower levels that still do not bring any individual to a level that is associated with clinically relevant effects. However, this would be considered adverse because individuals within the population would have diminished reserve function, and therefore would be at increased risk if affected by another agent (ATS 2000).

At SO_2 concentrations ≥ 400 ppb, controlled human exposure studies have reported decrements in lung function that are often statistically significant at the group mean level, and that are frequently accompanied by respiratory symptoms. Being mindful that the ATS

[4] Studies utilizing a mouthpiece exposure system cannot be directly compared to studies involving freely breathing subjects, as nasal absorption of SO_2 is bypassed during oral breathing, thus allowing a greater fraction of inhaled SO_2 to reach the tracheobronchial airways. As a result, individuals exposed to SO_2 through a mouthpiece are likely to experience greater respiratory effects from a given SO_2 exposure.

[5] FEV_1 and sRaw are measures of bronchoconstriction. Decreases in FEV_1 or increases in sRaw can result in difficulty breathing.

[6] The ISA cites one chamber study with intermittent exercise where healthy and asthmatic children were exposed to 100 ppb SO_2 in a mixture with ozone and sulfuric acid. The ISA notes that compared to exposure to filtered air, exposure to the pollutant mix did not result in statistically significant changes in lung function or respiratory symptoms (ISA section 3.1.3.4)

[7] These transcripts can be found in Docket ID No. EPA–HQ–ORD–2006–0260. Available at *www.regulations.gov.*

guidelines described above specifically indicate decrements in lung function with accompanying respiratory symptoms as being adverse, exposure to 5–10 minute SO_2 concentrations ≥ 400 ppb are clearly adverse.

The ISA has also reported that exposure to SO_2 concentrations as low as 200–300 ppb for 5–10 minutes results in approximately 5–30% of exercising asthmatics experiencing moderate or greater decrements in lung function (defined in terms of a ≥ 15% decline in FEV_1 or 100% increase in sRaw; ISA, Table 3–1). Considering the 2000 ATS guidelines mentioned above, the REA found that these results could reasonably indicate an SO_2-induced shift in these lung function measurements for this population. As a result, a significant percentage of exercising asthmatics exposed to SO_2 concentrations as low as 200 ppb would have diminished reserve lung function and would be at greater risk if affected by another respiratory agent (*e.g.,* viral infection). Importantly, diminished reserve lung function in a population that is attributable to air pollution is an adverse effect under ATS guidance. In addition to the 2000 ATS guidelines, the REA was also mindful of: (1) Previous CASAC recommendations (Henderson 2006) and NAAQS review conclusions (EPA 2006, EPA 2007d) indicating that moderate decrements in lung function can be clinically significant in some asthmatics; and (2) subjects participating in these controlled human exposure studies not likely including the most severe asthmatics. Taken together, the REA concluded that exposure to SO_2 concentrations at least as low as 200 ppb can result in adverse health effects in asthmatics.

Importantly, the final REA noted that this conclusion was in agreement with CASAC comments following the first draft SO_2 REA (REA section 4.3). The first draft SO_2 REA focused its analyses on exposures and risk associated with 5-minute SO_2 concentrations ≥ 400 ppb. However, CASAC strongly advised the Administrator that effects to exercising asthmatics at levels at least as low as 200 ppb can be adverse, and thus, should be considered in the second draft and final REAs (Henderson 2008).

2. Respiratory effects and 1- to 24-hour exposure to SO_2

In addition to the controlled human exposure evidence described above, the ISA based its causal finding of an association between short-term (5-minutes to 24-hours) exposure to SO_2 and respiratory morbidity on results from epidemiologic studies of respiratory symptoms, as well as ED visits and hospital admissions for all respiratory causes and asthma. More specifically, the ISA describes the results from these epidemiologic studies as providing ''supporting evidence'' for its determination of causality (ISA section 5.2). Key epidemiologic studies of respiratory symptoms, as well as ED visits and hospital admissions are discussed below.

a. Respiratory symptoms

The ISA found that the strongest epidemiologic evidence of an association between short-term SO_2 concentrations and respiratory symptoms was in children. Studies conducted in North America and abroad generally reported positive associations between ambient SO_2 concentrations and respiratory symptoms in children. U.S. studies of respiratory symptoms in children (identified from Table 5–4 of the ISA), including three large multi-city studies, are described briefly below and in more detail in section 3.1.4.1 of the ISA.

The National Cooperative Inner-City Asthma Study (NCICAS, Mortimer *et al.* 2002) included asthmatic children (n = 846) from eight U.S. urban areas and examined the relationship between respiratory symptoms and summertime air pollution levels. The strongest associations were found between morning symptoms (*e.g.,* morning cough) and the median 3-hour average SO_2 concentrations during morning hours (8 a.m. to 11 a.m.)—following a 1- to 2-day lag (ISA, Figure 3–2). Three-hour average concentrations in the morning hours ranged from 17 ppb in Detroit to 37 ppb in East Harlem, NY. This relationship remained robust and statistically significant in multi-pollutant models with ozone (O_3), and nitrogen dioxide (NO_2). When PM_{10} was also added to the model, the effect estimate remained relatively unchanged, although was no longer statistically significant (ISA, Figure 3–2). However, the ISA noted that the loss of statistical significance could have been the result of reduced statistical power since only three of the eight cities were included in the multi-pollutant analysis with PM (ISA, section 3.1.4.1).

The Childhood Asthma Management Program (CAMP, Schildcrout *et al.* 2006) examined the association between ambient air pollution and asthma exacerbations in children (n = 990) from eight North American cities. The median 24-hour average SO_2 concentrations (collected in seven of the eight study locations) ranged from 2.2 ppb in San Diego to 7.4 ppb in St. Louis. Positive associations with an increased risk of asthma symptoms were observed at all lags, but only the association at the 3-day moving average was statistically significant (ISA, Figure 3–3). In joint-pollutant models with carbon monoxide (CO) and NO_2, the 3-day moving average effect estimates remained robust and statistically significant. In a joint-pollutant model with PM_{10}, the 3-day moving average effect estimate remained relatively unchanged, but was no longer statistically significant (ISA Figure 3–3).

A longitudinal study of schoolchildren (n = 1,844) during the summer months from the Harvard Six Cities Study suggested that the association between SO_2 and respiratory symptoms may potentially be confounded by PM_{10} (Schwartz *et al.,* 1994). It should be noted that unlike the NCICAS and CAMP studies, this study was not limited to asthmatic children. The median 24-hour average SO_2 concentration during this period was 4.1 ppb. SO_2 concentrations were found to be statistically significantly associated with cough incidence and lower respiratory symptoms in single pollutant models. However, the effect of SO_2 was substantially reduced and no longer statistically significant after adjustment for PM_{10} in a co-pollutant model. The ISA noted that because PM_{10} concentrations were correlated strongly to SO_2-derived sulfate particles (r = 0.80), the reduced SO_2 effect estimate may indicate that for PM_{10} dominated by fine sulfate particles, PM_{10} has a slightly stronger association than SO_2 to cough incidence and lower respiratory symptoms (ISA, section 3.1.4.1.1).

In addition to the three U.S. multi-city studies mentioned above, evidence of an association between ambient SO_2 and respiratory symptoms in children was found in two additional U.S. respiratory symptom studies. Delfino *et al.,* (2003) reported a statistically significant positive association between 1-hour daily maximum SO_2 concentrations in Los Angeles and respiratory symptoms in Hispanic children with asthma (n = 22). Similarly, Neas *et al.,* (1995) reported a positive association between 12-hour average SO_2 concentrations in Uniontown, PA and incidence of evening cough in 4th and 5th graders (n = 83; ISA section 3.1.4.1). Neither of these single city studies employed multi-pollutant models, but given the consistency of results with other epidemiologic evidence, they nonetheless support the association between ambient SO_2 concentrations and respiratory symptoms in children.

b. Emergency department visits and hospitalizations

Respiratory causes for ED and hospitalization visits typically include asthma, pneumonia, Chronic Obstructive Pulmonary Disorder (COPD), upper and lower respiratory infections, as well as other minor categories. Since the last review, there have been more than 50 peer reviewed epidemiologic studies published worldwide and overall, the ISA concluded that these studies provide evidence to support an association between ambient SO_2 concentrations and ED visits and hospitalizations for all respiratory causes and asthma (ISA, section 3.1.4.6). Notably, the ISA also found that when analyses of ED visit and hospitalizations for all respiratory causes were restricted by age, the results among children (0–14 years) and older adults (65+ years) were mainly positive, but not always statistically significant (ISA, section 3.1.4.6). In these same studies, when all age groups were combined, the ISA found that the results were mainly positive; however, the excess risk estimates were generally smaller compared to children and older adults (ISA, Figure 3–6). Results from key ED visit and hospital admission studies conducted in the U.S. are described in general below, and a more detailed discussion of both the U.S. and international literature can be found in the ISA (ISA, section 3.1.4.6).

Of the respiratory ED visit and hospital admission studies reviewed in the ISA, 10 key studies were conducted in the United States (ISA, Table 5–5). Of these 10 studies, three evaluated associations with SO_2 using multi-pollutant models (Schwartz *et al.,* (1995) in Tacoma, WA and New Haven CT; New York Department of Health (NYDOH), (2006) in Bronx and Manhattan, NY; and Ito *et al.,* (2007) in New York City), while seven studies evaluated the SO_2 effect using only single pollutant models (Wilson *et al.,* (2005) in Manchester, NH and Portland, ME; Peel *et al.,* (2005) in Atlanta, GA; Tolbert *et al.,* (2007) in Atlanta GA; Jaffe *et al.,* (2003) in Cleveland, Cincinnati and Columbus, OH; Schwartz *et al.,* (1996) in Cleveland OH; Sheppard *et al.,* (2003) in Seattle, WA; and Lin *et al.,* (2004) in Bronx, NY). Taken together, these studies generally reported positive, but frequently not statistically significant associations between ambient SO_2 and ED visits and hospital admissions for all respiratory causes and for asthma. With regard to U.S. studies employing multi-pollutant models, results reported in Bronx, NY (NYDOH 2006) and New York City, NY (Ito *et al.,* 2007) remained robust and statistically significant in the presence of $PM_{2.5,}$ [10% (4, 16) and 29.6% (14.3, 46.8), respectively] while in New Haven, CT (Schwartz *et al.,* 1995) results remained robust and statistically significant in the presence of PM_{10} [2% (1, 3)]. However, in Manhattan, NY (NYDOH 2006) results reported from single, and multi-pollutant models were negative (although not statistically significantly negative), and in Tacoma, WA (Schwartz *et al.,* 1995) the SO_2 effect estimate [3% (1,6)] was reduced and no longer statistically significant in a multi-pollutant model with PM_{10} [−1% (−4, 3)]. In models including gaseous co-pollutants, the SO_2 effect estimate in the Bronx, NY (NYDOH 2006) remained statistically significant in the presence of NO_2 [10% (4,15)], while in NYC (Ito *et al.,* 2007) the SO_2 effect estimate remained statistically significant in the presence of O_3 [26.8% (13.7, 41.5)] and CO [31.1% (16.7, 47.2)], but not in the presence of NO_2 [−1.6% (−16.7, 16.1)].

3. ISA conclusions regarding short-term (5-minutes to 24-hours) SO_2 exposures

As noted above, the ISA found that moderate or greater decrements in lung function occur in some exercising asthmatics exposed to SO_2 concentrations as low as 200–300 ppb for 5–10 minutes. The ISA also found that among asthmatics, both the percentage of individuals affected, and the severity of the response increased with increasing SO_2 concentrations. That is, at 5–10 minute concentrations ranging from 200–300 ppb, the lowest levels tested in free breathing chamber studies, approximately 5–30% percent of exercising asthmatics experienced moderate or greater decrements in lung function (ISA, Table 3–1). At concentrations of 400–600 ppb, moderate or greater decrements in lung function occurred in approximately 20–60% of exercising asthmatics, and compared to exposures at 200–300 ppb, a larger percentage of asthmatics experienced severe decrements in lung function (*i.e.,* ≥200% increase in sRaw, and/or a ≥20% decrease in FEV_1) (ISA, Table 3–1). Moreover, at SO_2 concentrations ≥400 ppb (5–10 minute exposures), moderate or greater decrements in lung function were frequently accompanied by respiratory symptoms.

In addition, the ISA concluded that epidemiologic studies of respiratory symptoms in children, as well as emergency department visits and hospitalizations for all respiratory causes and asthma were consistent and coherent. This evidence was consistent in that associations were reported in studies conducted in numerous locations and with a variety of methodological approaches (ISA, section 5.2). It was coherent in that respiratory symptom results from epidemiologic studies of short-term (predominantly 1-hour daily maximum or 24-hour average) SO_2 concentrations were generally in agreement with respiratory symptom results from controlled human exposure studies of 5–10 minutes. These results were also coherent in that the respiratory effects observed in controlled human exposure studies of 5–10 minutes provided a basis for a progression of respiratory morbidity that could lead to the ED visits and hospitalizations observed in epidemiologic studies (ISA, section 5.2). In addition, the ISA concluded that U.S. and international epidemiologic studies employing multi-pollutant models suggested that SO_2 had a generally independent effect on respiratory morbidity outcomes (ISA, section 5.2).

The ISA also found that the respiratory effects of SO_2 were consistent with the mode of action as it is currently understood from animal toxicological and human exposure studies (ISA, section 5.2). The immediate effect of SO_2 on the respiratory system is bronchoconstriction. This response is mediated by chemosensitive receptors in the tracheobronchial tree. Activation of these receptors triggers central nervous system reflexes that result in bronchoconstriction and respiratory symptoms that are often followed by rapid shallow breathing (ISA, section 5.2). The ISA noted that asthmatics are likely more sensitive to the respiratory effects of SO_2 due to pre-existing inflammation associated with the disease. For example, pre-existing inflammation may lead to enhanced release of inflammatory mediators, and/or enhanced sensitization of the chemosensitive receptors (ISA, section 5.2).

Taken together, the ISA concluded that the controlled human exposure, epidemiologic, and toxicological evidence supported its determination of a causal relationship between respiratory morbidity and short-term (5-minutes to 24-hours) exposure to SO_2.

4. Health effects and long-term exposures to SO_2

There were numerous studies published since the last review examining possible associations between long-term SO_2 exposure and mortality and morbidity (respiratory morbidity, carcinogenesis, adverse prenatal and neonatal outcomes)

endpoints. However, the ISA concluded that the evidence relating long-term (weeks to years) SO_2 exposure to adverse health effects was ''inadequate to infer the presence or absence of a causal relationship'' (ISA, Table 5–3). That is, the ISA found the long-term health evidence to be of insufficient quantity, quality, consistency, or statistical power to make a determination as to whether SO_2 was truly associated with these health outcomes (ISA, Table 1–2).

5. SO_2-related impacts on public health

Interindividual variation in human responses to air pollutants indicates that some subpopulations are at increased risk for the detrimental effects of ambient exposure to SO_2. The NAAQS are intended to provide an adequate margin of safety for both general populations and sensitive subpopulations, or those subgroups potentially at increased risk for health effects in response to ambient air pollution. To facilitate the identification of subpopulations at the greatest risk for SO_2-related health effects, studies have identified factors that contribute to the susceptibility and/or vulnerability of an individual to SO_2. Susceptible individuals are broadly defined as those with a greater likelihood of an adverse outcome given a specific exposure in comparison with the general population (American Lung Association, 2001). The susceptibility of an individual to SO_2 can encompass a multitude of factors which represent normal developmental phases (*e.g.,* age) or biologic attributes (*e.g.,* gender); however, other factors (*e.g.,* socioeconomic status (SES)) may influence the manifestation of disease and also increase an individual's susceptibility (American Lung Association, 2001). In addition, subpopulations may be vulnerable to SO_2 in response to an increase in their exposure during certain windows of life (*e.g.,* childhood or old age) or as a result of external factors (*e.g.,* SES) that contribute to an individual being disproportionately exposed to higher concentrations than the general population. It should be noted that in some cases specific factors may affect both the susceptibility and vulnerability of a subpopulation to SO_2. For example, a subpopulation that is characterized as having low SES may have less access to healthcare resulting in the manifestation of a disease, which increases their susceptibility to SO_2, but they may also reside in a location that results in exposure to higher concentrations of SO_2, increasing their vulnerability to SO_2.

To examine whether SO_2 differentially affects certain subpopulations, stratified analyses are often conducted in epidemiologic investigations to identify the presence or absence of effect modification. A thorough evaluation of potential effect modifiers may help identify subpopulations that are more susceptible and/or vulnerable to SO_2. These analyses require the proper identification of confounders and their subsequent adjustment in statistical models, which helps separate a spurious from a true causal association. Although the design of toxicological and human clinical studies does not allow for an extensive examination of effect modifiers, the use of animal models of disease and the study of individuals with underlying disease or genetic polymorphisms do allow for comparisons between subgroups. Therefore, the results from these studies, combined with those results obtained through stratified analyses in epidemiologic studies, contribute to the overall weight of evidence for the increased susceptibility and vulnerability of specific subpopulations to SO_2. Those groups identified in the ISA to be potentially at greater risk of experiencing an adverse health effect from SO_2 exposure are described in more detail below.

a. Pre-existing respiratory disease

In human clinical studies, asthmatics have been shown to be more responsive to the respiratory effects of SO_2 exposure than healthy non-asthmatics. Although SO_2-attributable decrements in lung function have generally not been demonstrated at concentrations ≤ 1000 ppb in non-asthmatics, statistically significant increases in respiratory symptoms and decreases in lung function have consistently been observed in exercising asthmatics following 5–10 minute SO_2 exposures at concentrations ranging from 400–600 ppb (ISA, section 4.2.1.1). Moderate or greater SO_2-induced decrements in lung function have also consistently been observed at SO_2 concentrations ranging from 200–300 ppb in some asthmatics. The ISA also noted that a number of epidemiologic studies have reported respiratory morbidity in asthmatics associated with ambient SO_2 concentrations (ISA 4.2.1.1). For example, numerous epidemiologic studies have observed positive associations between ambient SO_2 concentrations and ED visits and hospitalizations for asthma (ISA section 4.2.1.1). Overall, the ISA concluded that epidemiologic and controlled human exposure studies indicated that individuals with pre-existing respiratory diseases, particularly asthma, are at greater risk than the general population of experiencing SO_2-associated health effects (ISA, section 4.2.1.1).

b. Genetics

The ISA noted that a consensus now exists among scientists that the potential for genetic factors to increase the risk of experiencing adverse health effects due to ambient air pollution merits serious consideration. Several criteria must be satisfied in selecting and establishing useful links between polymorphisms in candidate genes and adverse respiratory effects. First, the product of the candidate gene must be significantly involved in the pathogenesis of the effect of interest, which is often a complex trait with many determinants. Second, polymorphisms in the gene must produce a functional change in either the protein product or in the level of expression of the protein. Third, in epidemiologic studies, the issue of effect modification by other genes or environmental exposures must be carefully considered (ISA section 4.2.2).

Although many studies have examined the association between genetic polymorphisms and susceptibility to air pollution in general, only one study has specifically examined the effects of SO_2 exposure on genetically distinct subpopulations. Winterton *et al.* (2001) found a significant association between SO_2-induced decrements in FEV_1 and the homozygous wild-type allele in the promoter region of Tumor Necrosis Factor-α (TNF– α; AA, position–308). However, the ISA concluded that the overall body of evidence was too limited to reach a conclusion regarding the effects of SO_2 exposure on genetically distinct subpopulations at this time.

c. Age

The ISA identified children (*i.e.,* < 18 years of age) and older adults (*i.e.,* > 65 years of age) as groups that are potentially at greater risk of experiencing SO_2-associated adverse health effects. In children, the developing lung is prone to damage from environmental toxicants as it continues to develop through adolescence. The biological basis for increased risk in the elderly is unknown, but one hypothesis is that it may be related to changes in antioxidant defenses in the fluid lining the respiratory tract. The ISA found a number of epidemiologic studies that observed increased respiratory symptoms in children associated with increasing SO_2 concentrations. In addition, several studies have reported

that the excess risk estimates for ED visits and hospitalizations for all respiratory causes, and to a lesser extent asthma, associated with a 10-ppb increase in 24-hour average SO_2 concentrations were higher for children and older adults than for all ages together (ISA, section 4.2.3). However, the ISA also noted that the evidence from controlled human exposure studies does not suggest that adolescents are either more or less at risk than adults to the respiratory effects of SO_2, but rather adolescents may experience similar respiratory effects at a given exposure concentration (ISA, sections 3.1.3.5 and 4.2.3).[8] Overall, the ISA found that compared to the general population, there was limited evidence to suggest that children and older adults are at greater risk of experiencing SO_2-associated health effects (ISA, section 4.2.3).

d. Time spent outdoors

Outdoor SO_2 concentrations are generally much higher than indoor concentrations. Thus, the ISA noted that individuals who spend a significant amount of time outdoors are likely at greater risk of experiencing SO_2-associated health effects than those who spend most of their time indoors (ISA section 4.2.5).

e. Ventilation rate

Controlled human exposure studies have demonstrated that decrements in lung function and respiratory symptoms occur at significantly lower SO_2 exposure levels in exercising subjects compared to resting subjects. As ventilation rate increases, breathing shifts from nasal to oronasal, thus resulting in greater uptake of SO_2 in the tracheobronchial airways due to the diminished absorption of SO_2 in the nasal passages. Therefore, individuals who spend a significant amount of time at elevated ventilation rates (*e.g.* while playing, exercising, or working) are expected to be at greater risk of experiencing SO_2-associated health effects (ISA section 4.2.5).

f. Socioeconomic status

There is limited evidence that increased risk to SO_2 exposure is associated with lower SES (ISA section 4.2.5). Finkelstein *et al.* (2003) found that among people with below-median income, the relative risk for above-median exposure to SO_2 was 1.18 (95% CI: 1.11, 1.26); the corresponding relative risk among subjects with above-median income was 1.03 (95% CI: 0.83, 1.28). However, the ISA concluded that there was insufficient evidence to reach a conclusion regarding SES and exposure to SO_2 at this time (ISA section 4.2.5).

g. Size of at-risk populations

Considering the size of the groups mentioned above, large proportions of the U.S. population are likely to have a relatively high risk of experiencing SO_2-related health effects. In the United States, approximately 7% of adults and 9% of children have been diagnosed with asthma. Notably, the prevalence and severity of asthma is higher among certain ethnic or racial groups such as Puerto Ricans, American Indians, Alaskan Natives, and African Americans (EPA 2008b). Furthermore, a higher prevalence of asthma among persons of lower SES and an excess burden of asthma hospitalizations and mortality in minority and inner-city communities have been observed. In addition, population groups based on age comprise substantial segments of individuals that may be potentially at risk for SO_2-related health impacts. Based on U.S. census data from 2000, about 72.3 million (26%) of the U.S. population are under 18 years of age, 18.3 million (7.4%) are under 5 years of age, and 35 million (12%) are 65 years of age or older. There is also concern for the large segment of the population that is potentially at risk to SO_2-related health effects because of increased time spent outdoors at elevated ventilation rates (those who work or play outdoors). Overall, the considerable size of the population groups at risk indicates that exposure to ambient SO_2 could have a significant impact on public health in the United States.

C. Human exposure and health risk characterization

To put judgments about SO_2-associated health effects into a broader public health context, EPA has drawn upon the results of the quantitative exposure and risk assessments. Judgments reflecting the nature of the evidence and the overall weight of the evidence are taken into consideration in these quantitative exposure and risk assessments, discussed below. These assessments provide estimates of the likelihood that asthmatics at moderate or greater exertion (*e.g.* while exercising) would experience SO_2 exposures of potential concern as well as an estimate of the number and percent of exposed asthmatic individuals likely to experience SO_2-induced lung function responses (*i.e.,* moderate or greater decrements in lung function defined in terms of sRaw or FEV_1) under varying air quality scenarios (*e.g.,* just meeting the current or alternative standards). These assessments also characterize the kind and degree of uncertainties inherent in such estimates.

This section describes the approach taken in the REA to characterize SO_2-related exposures and health risks. Goals of the REA included estimating short-term exposures and potential human health risks associated with (1) recent levels of ambient SO_2; (2) SO_2 levels adjusted to simulate just meeting the current standards; and (3) SO_2 levels adjusted to simulate just meeting potential alternative 1-hour standards. This section discusses the scientific evidence from the ISA that was used as the basis for the risk characterization (II.C.1), the approaches used in characterizing exposures and risks (II.C.2), and important uncertainties associated with these analyses (II.C.3). The results of the exposure and risk analyses, as they relate to the current and potential alternative standards, are discussed in subsequent sections of this proposal (sections II.E and II.F, respectively).

1. Evidence base for the risk characterization

As previously mentioned, the ISA concluded that the evidence for an association between respiratory morbidity and SO_2 exposure was ''sufficient to infer a causal relationship'' (ISA, section 5.2) and that the ''definitive evidence'' for this conclusion was from the results of 5–10 minute controlled human exposure studies demonstrating decrements in lung function and/or respiratory symptoms in exercising asthmatics (ISA, section 5.2). Accordingly, the REA concluded that quantitative exposure and risk analyses should focus on 5-minute levels of SO_2 in excess of potential health effect benchmark values derived from the controlled human exposure literature (REA, section 6.2). These benchmark levels are not potential standards, but rather are concentrations which represent ''exposures of potential concern'' which are used in the analyses to estimate potential exposures and risks associated with 5-minute concentrations of SO_2. In addition, although the REA concluded that the epidemiologic evidence was not appropriate for use in quantitative risk analyses (REA, section 6.3), these studies were considered in the selection of potential alternative standards for use in the air quality, exposure and risk analyses (REA, chapter 5), as well as in

[8] Very young children are not included in controlled human exposure studies and this absence of data on what is likely to be a sensitive life stage is a source of uncertainty for children's susceptibility.

the REA's assessment of the adequacy of the current and potential alternative primary standards (REA, sections 10.3; 10.4; and 10.5).

As mentioned above, the health effect benchmark values used in the REA were derived primarily from the ISA's evaluation of the 5–10 minute controlled human exposure literature. The ISA concluded that moderate or greater decrements in lung function occurred in approximately 5–30% of exercising asthmatics following exposure to 200–300 ppb SO_2 for 5–10 minutes. As explained in section II.B.1.b, the ISA concluded that moderate or greater decrements in lung function occurred in approximately 20–60% of exercising asthmatics following exposure to 400–600 ppb SO_2 for 5–10 minutes. The ISA also concluded that at SO_2 concentrations ≥ 400 ppb, statistically significant moderate or greater decrements in lung function at the group mean level have often been reported and are frequently accompanied by respiratory symptoms (ISA, section 3.1.3.5).

In addition to the health evidence from the ISA presented above, when considering potential health effect benchmark levels, the REA noted: (1) Subjects participating in human exposure studies typically do not include individuals who may be most susceptible to the respiratory effects of SO_2, (*e.g.,* the most severe asthmatics given the obvious ethical issues of subjecting such persons to the clinical tests) and (2) given that approximately 5–30% of exercising asthmatics experienced moderate or greater decrements in lung function following exposure to 200–300 ppb SO_2 (the lowest levels tested in free-breathing chamber studies), it is likely that a percentage of exercising asthmatics would also experience similar decrements in lung function following exposure to levels lower than 200 ppb (REA, section 6.2). That is, the REA concluded that there was no evidence to suggest that 200 ppb represented a threshold level below which no adverse respiratory effects would occur (REA, section 6.2). Moreover, the REA considered that small SO_2-induced lung function decrements have been observed in exercising asthmatics at concentrations as low as 100 ppb when SO_2 is administered via mouthpiece (ISA, section 3.1.3).

Taken together, the REA concluded it appropriate to examine potential 5-minute benchmark values in the range of 100–400 ppb (REA, section 6.2). The lower end of the range considered the factors mentioned above, while the upper end of the range recognized that 400 ppb represents the lowest concentration at which moderate or greater decrements in lung function are frequently accompanied by respiratory symptoms (REA, section 6.2): a combination of effects which would clearly be considered adverse under ATS guidelines (ATS, 1985).

Although the analysis of exposures of potential concern were conducted using discrete benchmark levels (*i.e.,* 100, 200, 300, 400 ppb), EPA recognizes that there is no sharp breakpoint within the continuum ranging from at and above 400 ppb down to 100 ppb. In considering the concept of exposures of potential concern, it is important to balance concerns about the potential for health effects and their severity with the increasing uncertainty associated with our understanding of the likelihood of such effects at lower SO_2 levels. Within the context of this continuum, estimates of exposures of potential concern at discrete benchmark levels provide some perspective on the potential public health impacts of SO_2-related health effects that have been demonstrated in controlled human exposure studies. They also help in understanding the extent to which such impacts could change by just meeting the current and potential alternative standards. However, estimates of the number of asthmatics likely to experience exposures of potential concern cannot be translated directly into quantitative estimates of the number of people likely to experience specific health effects. Due to individual variability in responsiveness, only a subset of asthmatics exposed at and above a specific benchmark level can be expected to experience health effects. The amount of weight to place on the estimates of exposures of potential concern at any of these benchmark levels depends in part on the weight of the scientific evidence concerning health effects associated with SO_2 exposures at and above that benchmark level. Such public health policy judgments are embodied in the NAAQS standard setting criteria (*i.e.,* standards that, in the judgment of the Administrator, are requisite to protect public health with an adequate margin of safety).

Since exposures of potential concern cannot be directly translated into quantitative estimates of the number of individuals likely to experience specific health effects, the REA not only characterizes exposure and risks utilizing exposures of potential concern, but also uses information from the controlled human exposure literature to conduct a quantitative risk assessment. The quantitative risk assessment estimated the number and percentage of exposed asthmatics at moderate or greater exertion expected to experience a moderate or greater lung function response (in terms of a ≥ 100% increase in sRaw and/or a ≥ 15% decline in FEV_1; see section II.C.2).

2. Overview of approaches

As noted above, the purpose of the assessments described in the REA was to characterize air quality, exposures, and health risks associated with recent ambient levels of SO_2, with SO_2 levels that could be associated with just meeting the current SO_2 NAAQS, and with SO_2 levels that could be associated with just meeting potential alternative standards. The REA utilizes three approaches to characterize health risks In the first approach, for each air quality scenario, statistically estimated [9] and measured ambient 5-minute SO_2 concentrations were compared to the 5-minute potential health effect benchmark levels discussed above which (as noted) were derived from the controlled human exposure literature (REA, chapter 7). In the second approach, modeled estimates of 5-minute exposures in asthmatics at moderate or greater exertion (*e.g.* while exercising) were compared to these 5-minute potential health effect benchmark levels. In the third approach, exposure-response relationships from individual level data from controlled human exposure studies were used in conjunction with the outputs of the exposure analysis to estimate health impacts under the air quality scenarios mentioned above. A brief description of these approaches is provided below and each approach is described in detail in chapters 7 through 9 of the REA.

In the first approach, statistically estimated and actual measured 5-minute ambient SO_2 concentrations were compared to 5-minute potential health effect benchmark levels (REA, chapter 7). The results generated from the air quality analysis were considered a broad characterization of national air

[9] Benchmark values derived from the controlled human exposure literature were associated with a 5-minute averaging time. However, only 98 ambient monitors located in 13 states from 1997–2007 reported measured 5-minute SO_2 concentrations since such monitoring is not required (see section III). In contrast, 809 monitors in 48 states, DC, Puerto Rico, and the Virgin Islands reported 1-hour SO_2 concentrations over a similar time period. Therefore, to broaden analyses to areas where measured 5-minute SO_2 concentrations were not available, the REA utilized a statistical relationship to estimate the highest 5-minute level in an hour, given a reported 1-hour average SO_2 concentration (REA, section 6.4). Then, similar to measured 5-minute SO_2 levels, statistically estimated 5-minute SO_2 concentrations were compared to 5-minute potential health effect benchmark values.

quality and human exposures that might be associated with these 5-minute SO_2 concentrations. An advantage of the air quality analysis is its relative simplicity; however, there is uncertainty associated with the assumption that SO_2 air quality can serve as an adequate surrogate for total exposure to ambient SO_2. Actual exposures might be influenced by factors not considered by this approach, including small scale spatial variability in ambient SO_2 concentrations (which might not be captured by the network of fixed-site ambient monitors) and spatial/temporal variability in human activity patterns.

In the second approach, an inhalation exposure model was used to generate more realistic estimates of personal exposures in asthmatics (REA, chapter 8). This analysis estimated temporally and spatially variable ambient 5-minute SO_2 concentrations and simulated asthmatics contact with these pollutant concentrations while at moderate or greater exertion (*i.e.,* while at elevated ventilation rates). The approach was designed to estimate exposures that are not necessarily represented by the existing ambient monitoring data. AERMOD, an EPA dispersion model, was used to estimate 1-hour ambient SO_2 concentrations using emissions estimates from stationary, non-point, and port sources. The Air Pollutants Exposure (APEX) model, an EPA human exposure model, was then used to estimate population exposures using the estimated hourly census block level SO_2 concentrations. From these 1-hour census block concentrations, 5-minute maximum SO_2 concentrations within each hour were estimated using the statistical relationship mentioned above. A probabilistic approach was then used to model asthmatics' exposures considering: (1) Time spent in different microenvironments; (2) time spent at moderate or greater exertion; and (3) the variable SO_2 concentrations that occur within these microenvironments across time, space, and microenvironment type. Estimates of personal exposure to 5-minute SO_2 levels were then compared to the 5-minute potential health benchmark levels (*i.e.,* 5-minute benchmark levels of 100, 200, 300, and 400 ppb). This approach to assessing exposures was more resource intensive than using ambient levels as an indicator of exposure; therefore, the final REA included the analysis of two locations: St Louis and Greene County, MO. Although the geographic scope of this analysis was limited, the approach provided estimates of SO_2 exposures in asthmatics and asthmatic children in St. Louis and Greene Counties and thus, served to complement the broader air quality characterization.

For the characterization of risks in both the air quality analysis and the exposure modeling analysis described above, the REA used a range of 5-minute potential health effect benchmarks: 100, 200, 300, and 400 ppb. These benchmark values were compared to both SO_2 air quality levels and to estimates of SO_2 exposure in asthmatics. When SO_2 air quality was used as an indicator of exposure, a key output of the analysis was an estimate of the number of days per year specific locations experienced statistically estimated 5-minute daily maximum levels of SO_2 that exceeded one of these 5-minute potential health effect benchmarks. When personal exposures were simulated, the output of the analysis was an estimate of the number and percent of asthmatics and asthmatic children at risk for experiencing, at least once per year, a statistically estimated 5-minute daily maximum level of SO_2 of ambient origin in excess of one of these benchmarks. An advantage of using the benchmark approach to characterize health risks is that the effects observed in the controlled human exposure studies clearly result from SO_2 exposure, so the benchmarks are reliable levels at which effects to asthmatics from exposure to SO_2 can occur. A limitation of this approach is that the magnitude of the SO_2 effect on decrements in lung function and respiratory symptoms can vary considerably from individual to individual and thus, not all asthmatics would be expected to respond to the same levels of SO_2 exposure. Therefore, numbers of exposures can be quantified more readily than the number of individuals experiencing SO_2-induced lung function decrements and/or respiratory symptoms.

The third approach was a quantitative risk assessment. This approach combined results from the exposure analysis (*i.e.,* the number of exposed total asthmatics or asthmatic children while at moderate or greater exertion) with exposure-response functions derived from individual level data from controlled human exposure studies (see ISA, Table 3–1 and Johns (2009) [10]) to estimate the percentage and number of exposed asthmatics and asthmatic children likely to experience a moderate or greater lung function response (*i.e.,* decrements in lung function defined in terms of FEV_1 and sRaw) under the air quality scenarios mentioned above (REA, chapter 9). The advantage of this approach is that it recognizes that not all exposed asthmatics at moderate or greater exertion will have a lung function response. Moreover, it is advantageous in that rather than considering discrete potential health effect benchmark levels, it quantitatively estimates the number and percent of asthmatics and asthmatic children likely to experience a moderate or greater lung function response considering the entire distribution of personal exposures.

3. Key limitations and uncertainties

The way in which air quality, exposure, and risk results will inform ultimate decisions regarding the current and potential alternative SO_2 standards will depend upon the weight placed on each of the analyses when uncertainties associated with those analyses are taken into consideration. Sources of uncertainty associated with each of the analyses (air quality, exposure, and quantitative risk) are briefly presented below and are described in more detail in chapters 7–9 of the REA.

In the air quality analysis, the REA used ambient SO_2 data from both the limited number of monitors reporting 5-minute concentrations and the broader network of monitors reporting 1-hour concentrations of SO_2 to characterize U.S. air quality. There was general agreement in the monitor site attributes and emissions sources potentially influencing ambient monitoring concentrations for each set of data analyzed. However, the REA noted that the greatest relative uncertainty was in the spatial representativeness of both the overall monitoring network and the subsets of monitors chosen for detailed analyses (REA, section 7.4.2.4).

An additional source of uncertainty in the air quality analysis is associated with the statistical model used to estimate 5-minute maximum SO_2 concentrations at monitors that reported only 1-hour SO_2 concentrations (REA, section 7.4.2.6). Cross-validation of statistically estimated 5-minute concentrations with the limited number of reported 5-minute SO_2 measurements indicated that the greatest difference in the predicted versus observed numbers of benchmark exceedances occurred at the lower and upper tails of the distribution. However, the REA noted that overall, the results of the cross-validation analysis indicated reasonable model performance (REA, sections 10.3.3.1 and 10.5.2).

The air quality characterization assumes that the ambient monitoring

[10] EPA recently conducted a complete quality assurance review of all individual subject data. The results of this review did not substantively change any of the entries in ISA, Table 3–1, and did not in anyway affect the conclusions of the ISA (see Johns and Simmons, 2009).

data and the estimated days per year with exceedances of the specified benchmark levels can serve as an indicator of exposure. Longer-term personal SO_2 exposure (*i.e.,* days to weeks) concentrations are correlated with and are a fraction of ambient SO_2 concentrations. However, uncertainty remains in this relationship when considering short-term (*i.e.,* 5-minute) averaging times because of the lack of comparable measurement data (REA, section 7.4.2.7).

The St. Louis and Greene county exposure assessments were also associated with a number of key uncertainties that should be considered when interpreting the results with regard to decisions on the standard. Such uncertainties are highlighted below, and these, as well as other sources of uncertainty, are also discussed in greater depth in section 8.11 of the REA.

In the exposure analyses, it was necessary to derive an area source emission profile rather than use a default profile to improve the agreement between ambient measurements and model predicted 1-hour SO_2 concentrations. The improved model performance reduces uncertainty in the 1-hour SO_2 concentrations predictions, but nonetheless remains as an important uncertainty in the absence of actual local source emission profiles (REA, section 8.11.2).

The St. Louis and Greene county exposure assessments were performed to better reflect both the temporal and spatial representation of ambient concentrations and to estimate the rate of contact of asthmatic individuals with 5-minute SO_2 concentrations while engaged in moderate or greater exertion. Estimated annual average SO_2 exposures in the two exposure modeling domains are consistent with long-term personal exposures (*i.e.,* days to weeks) measured in other U.S. locations (REA, chapter 8). However, uncertainty remains in the estimated number of persons with 5-minute SO_2 concentrations above benchmark levels because of the lack of comparable measurement data, particularly considering both the short-term averaging time and geographic location (REA, section 8.11.2).

In addition, although all 5-minute ambient SO_2 concentrations in the exposure analyses were estimated by the exposure model, each hour was comprised of the maximum 5-minute SO_2 concentration and eleven other 5-minute SO_2 concentrations normalized to the 1-hour mean concentration. The REA assumed that this approach would reasonably estimate the number of individuals exposed to peak concentrations. Sensitivity analyses revealed that both the number of persons exposed and where peak exposures occur can vary when considering an actual 5-minute temporal profile (REA, Section 8.11.2)

A number of key uncertainties should also be considered when interpreting the results of the St. Louis and Greene County risk assessment with regard to decisions on the standard. Such uncertainties associated with the St Louis and Greene County risk assessment are discussed briefly below and in greater depth in section 9.4 of the REA.

In the quantitative risk assessment, it was necessary to estimate responses at SO_2 levels below the lowest exposure levels used in the free-breathing controlled human exposure studies (*i.e.,* below 200 ppb). Probabilistic exposure-response relationships were derived in the REA using two different functional forms (*i.e.,* probit and 2-parameter logistic), but nonetheless there remains greater uncertainty in responses below 200 ppb because of the lack of comparable experimental data. Moreover, because the controlled human exposure studies used in the risk assessment involved only SO_2 exposures, it was assumed in the REA that estimates of SO_2-induced health responses are not affected by the presence of other pollutants (*e.g.,* $PM_{2.5}$, O_3, NO_2; REA, section 9.4).

The risk assessment assumes that the SO_2-induced responses for individuals are reproducible. The REA noted that this assumption had some support in that one study (Linn *et al.,* 1987) exposed the same subjects on two occasions to 600 ppb and the authors reported a high degree of correlation while observing a much lower correlation for the lung function response observed in the clean air with exercise exposure (REA, section 9.4).

Because the vast majority of controlled human exposure studies investigating lung function responses were conducted with adult subjects, the risk assessment relies on data from adult asthmatic subjects to estimate exposure-response relationships that have been applied to all asthmatic individuals, including children. The ISA (section 3.1.3.5) indicates that there is a strong body of evidence that suggests adolescents may experience many of the same respiratory effects at similar SO_2 levels, but recognizes that these studies administered SO_2 via inhalation through a mouthpiece (which can result in an increase in lung SO_2 uptake) rather than in an exposure chamber. Therefore, the uncertainty is greater in the risk estimates for asthmatic children (REA, section 9.4) [11].

D. Considerations in review of the standards

This section presents the integrative synthesis of the evidence and information contained in the ISA and the REA with regard to the current and potential alternative standards. EPA notes that the final decision on retaining or revising the current primary SO_2 standards is a public health policy judgment to be made by the Administrator. The Administrator's final decision will draw upon scientific information and analyses related to health effects, population exposures, and risks; as well as judgments about the appropriate response to the range of uncertainties that are inherent in the scientific evidence and analyses; and comments received in response to this proposal.

1. Background on the current standards

There are currently two SO_2 primary standards. The 24-hour average standard is 0.14 ppm not to be exceeded more than once per year and the annual average standard is 0.03 ppm. In the last review of the SO_2 NAAQS, both the 24-hour and annual standards were retained. The rationale for the retention of these standards is discussed briefly below.

In the last review, retention of the 24-hour standard was based largely on epidemiologic studies conducted in London in the 1950s and 1960s. The results of those studies suggested an association between 24-hour average levels of SO_2 and increased daily mortality and aggravation of bronchitis when in the presence of elevated levels of PM (53 FR 14927). Additional epidemiologic evidence suggested that elevated SO_2 levels were associated with the possibility of small, reversible declines in children's lung function (53 FR 14927). However, it was noted that in the locations where these epidemiologic studies were conducted, high SO_2 levels were usually accompanied by high levels of PM, thus making it difficult to disentangle the individual contribution each pollutant had on these health outcomes. It was also noted that rather than 24-hour average SO_2 levels, the health effects observed in these studies may have been related, at least in part, to the

[11] Very young children were not included in the controlled human exposure data which served as the basis for the exposure-response relationships used in the risk assessment. This absence of data on what is likely to be a sensitive life stage is an additional source of uncertainty in the risk assessment.

occurrence of shorter-term peaks of SO_2 within a 24-hour period (53 FR 14927).

Retention of the annual standard in the last review was largely based on an assessment of qualitative evidence gathered from a limited number of epidemiologic studies. The strongest evidence for an association between annual SO_2 concentrations and adverse health effects in the 1982 AQCD was from a study conducted by Lunn et al (1967). The authors found that among children, a likely association existed between chronic upper and lower respiratory tract illnesses and annual SO_2 levels of 70–100 ppb in the presence of 230–301 μg/m^3 black smoke. Three additional studies described in the 1986 Second Addendum also suggested that long-term exposure to SO_2 was associated with adverse respiratory effects. Notably, studies conducted by Chapman *et al.* (1985) and Dodge *et al.* (1985) found associations between long-term SO_2 concentrations (with or without high particle concentrations) and cough in children and young adults. However, it was noted that there was considerable uncertainty associated with these studies because they were conducted in locations subject to high, short-term peak SO_2 concentrations (*i.e.,* locations near point sources); therefore it was difficult to discern whether this increase in cough was the result of long-term, low level SO_2 exposure, or repeated short-term peak SO_2 exposures.

It was concluded in the last review that there was no quantitative rationale to support a specific range for an annual standard (EPA, 1994b). However, it was also found that although no single epidemiologic study provided clear quantitative conclusions, there appeared to be some consistency across studies indicating the possibility of respiratory effects associated with long-term exposure to SO_2 just above the level of the existing annual standard (EPA, 1994b). In addition, air quality analyses conducted during the last review indicated that the short-term standards being considered (1-hour and/or 24-hour) could not by themselves prevent long-term concentrations of SO_2 from exceeding the level of the existing annual standard in several large urban areas. Ultimately, both the scientific evidence and the air quality analyses were used by the Administrator to conclude that retaining the existing annual standard was requisite to protect human health.[12]

[12] Section I.C above discusses potential standards considered but not adopted in the last review, notably some type of standard to deal with effects of 5 to 10 minute exposures.

2. Approach for reviewing the need to retain or revise the current standards

The decision in the present review on whether the current 24-hour and/or annual standards are requisite to protect public health with an adequate margin of safety will be informed by a number of scientific studies and analyses that were not available in the 1996 review. Specifically, as discussed above (section II.B), a large number of epidemiologic studies have been published since the 1996 review. Many of these studies evaluated associations between SO_2 and adverse respiratory endpoints (*e.g.,* respiratory symptoms, emergency department visits, hospital admissions) in locations where 24-hour and annual average SO_2 concentrations were below the levels allowed by the current standards. In addition, with respect to adverse health effects associated with 5-minute SO_2 concentrations, the REA described estimates of SO_2-associated health risks that could be present in counties that just meet the current 24-hour or annual standards, whichever was controlling in a given county.[13] The approach for considering this scientific evidence and exposure/risk information is discussed below.

To evaluate whether the current primary SO_2 standards are adequate or whether consideration of revisions is appropriate, EPA is using an approach in this review described in chapter 10 of the REA which builds upon the approaches used in reviews of other criteria pollutants, including the most recent reviews of the NO_2, Pb, O_3, and PM NAAQS (EPA, 2008c; EPA, 2007c; EPA, 2007d; EPA, 2005), and reflects the body of evidence and information that is currently available. As in other recent reviews, EPA's considerations will include the implications of placing more or less weight or emphasis on different aspects of the scientific evidence and the exposure/risk-based information, recognizing that the weight to be given to various elements of the evidence and exposure/risk information is part of the public health policy judgments that the Administrator will make in reaching decisions on the standard.

A series of general questions frames this approach to considering the scientific evidence and exposure-/risk-based information. First, EPA's consideration of the scientific evidence and exposure/risk information with regard to the adequacy of the current standards is framed by the following questions:

- To what extent does evidence that has become available since the last review reinforce or call into question evidence for SO_2-associated effects that were identified in the last review?
- To what extent has evidence for different health effects and/or sensitive populations become available since the last review?
- To what extent have uncertainties identified in the last review been reduced and/or have new uncertainties emerged?
- To what extent does evidence and exposure-/risk-based information that has become available since the last review reinforce or call into question any of the basic elements of the current standard?

To the extent that the available evidence and exposure-/risk-based information suggests it may be appropriate to consider revision of the current standards, EPA considers that evidence and information with regard to its support for consideration of a standard that is either more or less stringent than the current standards. This evaluation is framed by the following questions:

- Is there evidence that associations, especially causal or likely causal associations, extend to ambient SO_2 concentrations as low as, or lower than, the concentrations that have previously been associated with health effects? If so, what are the important uncertainties associated with that evidence?
- Are exposures above benchmark levels and/or health risks estimated to occur in areas that meet the current standard? If so, are the estimated exposures and health risks important from a public health perspective? What are the important uncertainties associated with the estimated risks?

To the extent that there is support for consideration of a revised standard, EPA then considers the specific elements of the standard (indicator, averaging time, form, and level) within the context of the currently available information. In so doing, the Agency addresses the following questions regarding the elements of the standard:

- Does the evidence provide support for considering a different indicator for gaseous SO_X?

[13] As noted in the REA, the controlling standard by definition would be the standard that allows air quality to just meet either the annual concentration level of 30.4 ppb (*i.e.,* the annual standard is the controlling standard) or the 2nd highest 24-hour concentration level of 144 ppb (*i.e.,* the 24-hour standard is the controlling standard). The factor selected is derived from a single monitor within each county (even if there is more than one monitor in the county) for a given year. A different (or the same) monitor in each county could be used to derive the factor for other years; the only requirement for selection is that it be the lowest factor, whether derived from the annual or 24-hour standard level.

- Does the evidence provide support for considering different, or additional averaging times?
- What ranges of levels and forms of alternative standards are supported by the evidence, and what are the associated uncertainties and limitations?
- To what extent do specific averaging times, levels, and forms of alternative standards reduce the estimated exposures above benchmark levels and risks attributable to exposure to ambient SO_2, and what are the uncertainties associated with the estimated exposure and risk reductions?

The questions outlined above have been addressed in the REA. The following sections present considerations regarding the adequacy of the current standards and potential alternative standards, as discussed in chapter 10 of the REA, in terms of indicator, averaging time, form, and level.

E. Adequacy of the current standards

In considering the adequacy of the current standards, the policy assessment chapter of the REA considered the scientific evidence assessed in the ISA, as well as the air quality, exposure, and risk-based information presented in the REA. A summary of this evidence and information as well as CASAC recommendations and the Administrator's conclusions regarding the adequacy of the current standards are presented below. Section II.E.1 will discuss the adequacy of the current 24-hour standard and Section II.E.2 will then discuss adequacy of the current annual standard. Section II.E.3 will discuss CASAC views and finally, section II.E.4 discusses the Administrator's conclusions regarding the adequacy of the current 24-hour and annual standards.

1. Adequacy of the current 24-hour standard

a. Evidence-based considerations

In considering the SO_2 epidemiologic studies as they relate to the adequacy of the current 24-hour standard, the REA noted that 24-hour average SO_2 concentrations were below the current 24-hour average SO_2 NAAQS in many locations where positive and sometimes statistically significant associations were observed (REA, section 10.3). As discussed previously (see section II.B.3), the ISA characterized the epidemiologic evidence for respiratory effects as being consistent and coherent (ISA, section 5.2). The evidence is consistent in that positive associations are reported in studies conducted in numerous locations and with a variety of methodological approaches (ISA, section 5.2). It is coherent in the sense that respiratory symptom results from epidemiologic studies predominantly using 1-hour daily maximum or 24-hour average SO_2 concentrations are generally in agreement with the respiratory symptom results from controlled human exposure studies of 5–10 minutes. These results are also coherent in that the respiratory effects observed in controlled human exposure studies of 5–10 minutes provide a basis for a progression of respiratory morbidity that could lead to the ED visits and hospitalizations observed in epidemiologic studies (ISA, section 5.2). The ISA also noted that when the epidemiologic literature is considered as a whole, there are generally positive associations between SO_2 and respiratory symptoms in children, hospital admissions, and emergency department visits. Moreover, some of these associations were statistically significant, particularly the more precise effect estimates (ISA, section 5.2).

The interpretation of these SO_2 epidemiologic studies is complicated by the fact that SO_2 is but one component of a complex mixture of pollutants present in the ambient air. In order to provide some perspective on this uncertainty, the ISA evaluates epidemiologic studies that employ multi-pollutant models. Specifically, the ISA noted that a number of SO_2 epidemiologic studies have attempted to disentangle the effects of SO_2 from those of co-occurring pollutants by utilizing multi-pollutant models. When evaluated as a whole, SO_2 effect estimates in these models generally remained positive and relatively unchanged when co-pollutants were included. Therefore, although recognizing the uncertainties associated with separating the effects of SO_2 from those of co-occurring pollutants, the ISA concluded that the limited available evidence indicates that the effect of SO_2 on respiratory health outcomes appears to be generally robust and independent of the effects of gaseous co-pollutants, including NO_2 and O_3, as well as particulate co-pollutants, particularly $PM_{2.5}$ (ISA, section 5.2; p. 5–9).

In drawing broad conclusions regarding the evidence, the ISA considered the epidemiologic and experimental evidence as well as the uncertainties associated with that evidence. When this evidence and its associated uncertainties were taken together, the ISA concluded that the results of epidemiologic and experimental studies form a plausible and coherent data set that supports a relationship between SO_2 exposures and respiratory endpoints, including respiratory symptoms and ED visits, at ambient concentrations that are present in areas that meet the current 24-hour SO_2 NAAQS (ISA, section 5.5). Thus, taking into consideration the evidence discussed above, particularly the epidemiologic studies reporting SO_2-associated health effects in locations that meet the current 24-hour standard, the REA concluded that the epidemiologic evidence calls into question the adequacy of the current 24-hour standard to protect public health (REA, section 10.3.4).

b. Air quality, exposure, and risk-based considerations

As previously mentioned, the ISA found the evidence for an association between respiratory morbidity and SO_2 exposure to be ''sufficient to infer a causal relationship'' (ISA, section 5.2) and that the ''definitive evidence'' for this conclusion comes from the results of controlled human exposure studies demonstrating decrements in lung function and/or respiratory symptoms in exercising asthmatics (ISA, section 5.2). Accordingly, the exposure and risk analyses presented in the REA focused on exposures and risks associated with 5-minute peaks of SO_2 in excess of the potential health effect benchmark values of 100, 200, 300, and 400 ppb SO_2. In considering the results presented in these analyses, the REA particularly noted exceedances or exposures with respect to the 200 and 400 ppb 5-minute benchmark levels. These benchmark levels were highlighted in the REA because (1) 400 ppb represents the lowest concentration in controlled human exposure studies where moderate or greater lung function decrements which were often statistically significant at the group mean level, were frequently accompanied by respiratory symptoms; and (2) 200 ppb is the lowest level at which moderate or greater decrements in lung function in free-breathing human exposure studies have been observed (notably, 200 ppb is also the lowest level that has been tested). The REA also recognized that there was very limited evidence demonstrating small decrements in lung function at 100 ppb from two mouthpiece exposure studies. However, as previously noted (see section II.B.1.b), the results of these studies are not directly comparable to free-breathing chamber studies, and thus, the REA primarily considered exceedences of the 200 ppb and 400 ppb benchmark levels in its evaluation of the adequacy of the current 24-hour (as well

as the annual; see section II.E.2) standard.

A key output of the air quality analysis was the predicted number of statistically estimated 5-minute daily maximum SO_2 concentrations above benchmark levels given air quality simulated to just meet the level of the current 24-hour or annual SO_2 standard, whichever was controlling for a given county. Under this scenario, in 40 counties selected for detailed analysis, the REA found that the predicted yearly mean number of statistically estimated 5-minute daily maximum concentrations > 400 ppb ranges from 1–102 days per year,[14] with most counties in this analysis experiencing a mean of at least 20 days per year when statistically estimated 5-minute daily SO_2 concentrations exceed 400 ppb (REA, Table 7–14). In addition, the predicted yearly mean number of statistically estimated 5-minute daily maximum concentrations > 200 ppb ranged from 21–171 days per year, with about half of the counties in this analysis experiencing ≥ 70 days per year when 5-minute daily maximum SO_2 concentrations exceed 200 ppb (REA, Table 7–12).

The REA also generated exposure and risk estimates for two study areas in Missouri (*i.e.,* Greene County and several counties representing the St. Louis urban area) which had significant emission sources of SO_2. As noted in REA section 8.10, there were differences in the number of exposures above benchmark values when the results of the Greene County and St. Louis exposure assessments were compared. In addition, given that the results of the exposure assessment were used as inputs into the quantitative risk assessment, it was not surprising that there were also differences in the number of asthmatics at elevated ventilation rates estimated to have a moderate or greater lung function response in Greene County when compared to St. Louis. The REA noted that the differences in the St. Louis and Greene County exposure and quantitative risk results are likely indicative of the different types of locations they represent (see section 8.10). Greene County is a rural county with much lower population and emission densities, compared to the St. Louis study area which has population and emissions density similar to other urban areas in the U.S. It therefore follows that there would be greater exposures, and hence greater numbers and percentages of asthmatics at elevated ventilation rates experiencing moderate or greater lung function responses in the St. Louis study area. Thus, when considering the risk and exposure results as they relate to the adequacy of the current standards, the REA concluded that the St. Louis results were more informative in terms of ascertaining the extent to which the current standards protect against effects linked to the various benchmarks (linked in turn to 5-minute exposures). The results in fact suggested that the current standards may not adequately protect public health (REA, section 10.3.3). Moreover, the REA judged that the exposure and risk estimates for the St. Louis study area provided useful insights into exposures and risks for other urban areas in the U.S. with similar population and SO_2 emissions densities (REA, section 10.3.3).

When considering the St. Louis exposure results as they relate to the adequacy of the current standards, results discussed in the policy chapter of the REA included the percent of asthmatic children at moderate or greater exertion estimated to experience at least one exceedance of either the 200 or 400 ppb benchmark given air quality that was adjusted upward to simulate just meeting the current 24-hour standard (*i.e.,* the controlling standard in St. Louis).[15] Given this scenario, the REA found that approximately 24% of asthmatic children in that city would be estimated to experience at least one SO_2 exposure concentration greater than or equal to the 400 ppb benchmark level per year while at moderate or greater exertion (*e.g.,* while exercising; REA, Figure 8–19). Similarly, the REA found that approximately 73% of asthmatic children would be expected to experience at least one SO_2 exposure greater than or equal to a 200 ppb benchmark level while at moderate or greater exertion (REA, Figure 8–19).

When considering the St. Louis risk results as they relate to the adequacy of the current 24-hour standard, the policy assessment chapter of the REA included the percent of asthmatic children at elevated ventilation rates likely to experience at least one lung function response given air quality that is adjusted upward to simulate just meeting the current standards. Under this scenario, 19.1% to 19.2% of exposed asthmatic children at elevated ventilation rates were estimated to experience at least one moderate lung function response per year (defined as an increase in sRaw ≥ 100% (REA, Table 9–8)).[16] [17] Furthermore, 7.9% to 8.1% of exposed asthmatic children at moderate or greater exertion were estimated to experience at least one large lung function response per year (defined as an increase in sRaw ≥ 200% (REA, Table 9–8)).

c. Summary of considerations from the REA regarding the 24-hour standard

As noted above, the policy chapter of the REA considered several lines of scientific evidence when evaluating the adequacy of the current 24-hour standard to protect the public health. These included causality judgments made in the ISA, as well as the human exposure and epidemiologic evidence supporting those judgments. In particular, the REA concluded that numerous epidemiologic studies reporting positive associations between ambient SO_2 and respiratory morbidity endpoints were conducted in locations that met, or were below the current 24-hour standard (REA, section 10.3.4). The REA concluded that to the extent that these considerations are emphasized, the adequacy of the current 24-hour standard to protect the public health would clearly be called into question (REA, section 10.3.4). The REA found this suggested consideration of a revised 24-hour standard and/or that an additional shorter-averaging time standard may be needed to provide additional health protection for sensitive groups, including asthmatics and individuals who spend time outdoors at elevated ventilation rates (REA, section 10.3.4). This also suggested that an alternative SO_2 standard(s) should protect against health effects ranging from lung function responses and increased respiratory symptoms following 5–10 minute peak SO_2 exposures, to increased respiratory symptoms and respiratory-related ED visits and hospital admissions associated with 1-hour daily maximum or 24-hour average

[14] Air quality estimates presented in this section represent the mean number of days per year when 5-minute daily maximum SO_2 concentrations exceed a particular benchmark level given 2001–2006 air quality adjusted to just meet the current standards (see REA, Tables 7–11 to 7–14).

[15] Exposure and risk results presented in this notice are with respect to asthmatic children, results for all asthmatics are presented in REA chapters, 8, 9, and 10.

[16] The risk results presented represent the median estimate of exposed asthmatics expected to experience moderate or greater lung function decrements. Results are presented for both the probit and 2-parameter logistic functional forms. The full range of estimates can be found in chapter 9 of the REA, and in all instances the smaller estimate is a result of using the probit function to estimate the exposure-response relationship.

[17] In this notice, risk results with respect to moderate or greater lung function responses are presented in terms of sRaw (*i.e.,* ≥ 100% increases in sRaw). Risk results with respect to decrements in lung function defined in terms of FEV_1 can be found in chapter 9 of the REA.

SO_2 concentrations (REA, section 10.3.4).

In examining the air quality, exposure, and risk-based information with regard to the adequacy of the current 24-hour SO_2 standard to protect the public health, the REA found that the results described above (and in more detail in chapters 7–9 of the REA) indicated that 5-minute exposures that could reasonably be judged important from a public health perspective (see section II.B.1.c) were associated with air quality adjusted upward to simulate just meeting the current 24-hour standard. These exposures were judged in the REA to be significant from a public health perspective due to their frequency: approximately 24% of child asthmatics at moderate or greater exertion in St. Louis are estimated to be exposed at least once per year to air quality exceeding the 5-minute 400 ppb benchmark, a level associated with lung function decrements in the presence of respiratory symptoms. Additionally, approximately 73% of child asthmatics in St. Louis would be expected to be exposed at least once per year to air quality exceeding the 5-minute 200 ppb benchmark. Moreover, slightly over 19% of exposed child asthmatics in St. Louis would be expected to experience at least one adverse lung function response (defined in terms of a $\geq$ 100% increase in sRaw) each year. Therefore, the REA concluded that the air quality, exposure, and risk-based considerations reinforced the epidemiologic evidence in supporting the conclusion that consideration should be given to revising the current 24-hour standard and/or setting a new shorter averaging time standard (*e.g.,* 1-hour or less) to provide increased public health protection, especially for sensitive groups (*e.g.,* asthmatics), from SO_2-related adverse health effects (REA, section 10.3.4).

2. Adequacy of the current annual standard

In considering the adequacy of the current annual standard, the policy assessment chapter of the REA considered the scientific evidence assessed in the ISA and the air quality, exposure, and risk-based information presented in the REA. A summary of this evidence and information is presented below.

a. Evidence-based considerations

As an initial consideration with regard to the adequacy of the current annual standard, the REA noted that evidence relating long-term (weeks to years) SO_2 exposure to adverse health effects (respiratory morbidity, carcinogenesis, adverse prenatal and neonatal outcomes, and mortality) was judged by the ISA to be ''inadequate to infer the presence or absence of a causal relationship'' (ISA, Table 5–3). That is, the ISA found the health evidence to be of insufficient quantity, quality, consistency, or statistical power to make a determination as to whether SO_2 is truly associated with these health endpoints (ISA, Table 1–2). With respect specifically to respiratory morbidity in children (in part, the basis for the current annual standard; see section II.D.1), the ISA presented recent epidemiologic evidence of an association with long-term exposure to SO_2 (ISA, section 3.4.2). However, the ISA found the strength of these epidemiologic studies to be limited because of (1) variability in results across studies with respect to specific respiratory morbidity endpoints; (2) high correlations between long-term average SO_2 and co-pollutant concentrations, particularly PM; and (3) a lack of evaluation of potential confounding (ISA, section 3.4.2.1).

The REA also noted that many epidemiologic studies demonstrating positive associations between 1-hour daily maximum or 24-hour average SO_2 concentrations and respiratory symptoms, ED visits, and hospitalizations were conducted in areas where ambient SO_2 concentrations were well below the level of the current annual NAAQS (REA, section 10.4.2). The REA noted that this evidence suggested that the current annual standard was not providing adequate protection against health effects associated with shorter-term SO_2 concentrations found in epidemiologic studies (REA, section 10.4.2).

b. Air quality, exposure, and risk-based considerations

Results of the risk characterization based on the air quality assessment provided additional insight into whether there is a need to revise the current annual standard, focusing again on the extent to which the annual standard may be providing protection against effects associated with short-term exposures. In general, analyses presented in the REA described the extent to which the current annual standard provided protection against 5-minute peaks of SO_2 in excess of potential health effect benchmark levels (REA, chapter 7). The REA found that many of the monitors where frequent 5-minute exceedances were reported had annual average SO_2 concentrations well below the level of the current annual standard. Moreover, the REA found that there was little to no correlation between the annual average SO_2 concentration and the number of 5-minute daily maximum concentrations above potential health effect benchmark levels at these monitors (REA section 7.3.1). Thus, the REA concluded that the annual standard adds little in the way of protection against 5-minute peaks of SO_2 (REA, section 10.4.4).

c. Summary of considerations from the REA regarding the annual standard

As noted above, the ISA concluded that the evidence relating long-term (weeks to years) SO_2 exposure to adverse health effects (respiratory morbidity, carcinogenesis, adverse prenatal and neonatal outcomes, and mortality) was ''inadequate to infer the presence or absence of a causal relationship'' (ISA, Table 5–3). The ISA also reported that many epidemiologic studies demonstrating positive associations between short-term (*e.g.,* 1-hour daily maximum, 24-hour average) SO_2 concentrations and respiratory symptoms, as well as ED visits and hospitalizations, were conducted in areas where annual ambient SO_2 concentrations were well below the level of the current annual NAAQS. In addition, analyses conducted in the REA suggested that the current annual standard is not providing protection against 5–10 minute peaks of SO_2. Thus, the scientific evidence and the risk and exposure information suggest that the current annual SO_2 standard: (1) Is likely not needed to protect against health risks associated with long term exposure to SO_2; and 2) does not provide adequate protection from the health effects associated with shorter-term (*i.e.* $\leq$ 24-hours) SO_2 exposures. Thus, the policy chapter of the REA accordingly concluded that consideration should be given to either revoking the annual standard or retaining it without revision, in conjunction with setting an appropriate short-term standard(s) (REA, section 10.4.4).

3. CASAC views regarding the adequacy of the current 24-hour and annual standards

With regard to the adequacy of the current standards, CASAC conclusions were consistent with the views expressed in the policy assessment chapter of the REA.[18] CASAC agreed

[18] CASAC views with respect to the current 24-hour and annual standards, as well as with respect to potential alternative standards are those following their review of the second draft SO_2 REA, which contained a staff policy assessment chapter. EPA did not solicit, nor did it receive CASAC comments on the final policy assessment chapter contained in the final REA.

that the primary concern in this review is to protect against health effects that have been associated with short-term SO_2 exposures, particularly those of 5–10 minutes (Samet 2009). CASAC also agreed that the current 24-hour and annual standards are not sufficient to protect public health against the types of exposures that could lead to these health effects. Given these considerations, and as noted in their letter to the EPA Administrator, CASAC agreed ''that the current 24-hour and annual standards are not adequate to protect public health, especially in relation to short term exposures to SO_2 (5–10 minutes) by exercising asthmatics'' (Samet, 2009, p. 15). CASAC also noted: ''assuming that EPA adopts a one hour standard in the range suggested, and if there is evidence showing that the short-term standard provides equivalent protection of public health in the long-term as the annual standard, the panel is supportive of the REA discussion of discontinuing the annual standard'' (Samet 2009, p. 15). With regard to the current 24-hour standard, CASAC was generally supportive of using the air quality analyses in the REA as a means of determining whether the current 24-hour standard was needed in addition to a new 1-hour standard to protect public health. CASAC stated: ''the evidence presented [in REA Table 10–3] was convincing that some of the alternative one-hour standards could also adequately protect against exceedences of the current 24-hour standard'' (Samet 2009, p. 15) Discussion regarding CASAC's views on how the standard should be revised is provided below within the context of discussions on the elements (*i.e.,* indicator, averaging time, form, level) of a new short-term standard.

4. The Administrator's conclusions regarding adequacy of the current 24-hour and annual standards

Based on the epidemiologic evidence, the risk and exposure data set out in this section, as well as CASAC's advice and recommendations, the Administrator concludes (subject to consideration of public comment) that the current standards are not adequate to protect public health with an adequate margin of safety. The basis for this conclusion is as follows. First, the Administrator accepts and agrees with the ISA's conclusion that the results of controlled human exposure and epidemiologic studies form a plausible and coherent data set that supports a causal relationship between short-term (5-minutes to 24-hours) SO_2 exposures and adverse respiratory effects. The Administrator further agrees that the epidemiologic evidence (buttressed by the clinical evidence) indicates that the effects seen in the epidemiologic studies are attributable to exposure to SO_2. She also accepts and agrees with the conclusion of the ISA that ''[i]n the epidemiologic studies, respiratory effects were observed in areas where the maximum ambient 24-h avg SO_2 concentration was below the current 24-h avg NAAQS level * * *'' (ISA, section 5.2, p. 5–2.) and so would occur at ambient SO_2 concentrations that are present in locations meeting the current 24-hour NAAQS. The Administrator also notes that these effects occurred in areas with annual air quality levels considerably lower than those allowed by the current annual standard, indicating that the annual standard also is not providing protection against such effects. Existence of epidemiologic studies showing adverse effects occurring at levels allowed by the current standards is an accepted justification for finding that it is appropriate to revise the existing standards. See, *e.g. American Trucking Ass'n* v. *EPA,* 283 F. 3d 355, 370 (DC Cir. 2002).

With regard to the exposure and risk results, the Administrator notes and agrees with the analyses in the REA supporting that 5-minute exposures, reasonably judged important from a public health perspective, were associated with air quality adjusted upward to simulate just meeting the current standards. The Administrator especially notes the results of the St. Louis exposure analysis which, as summarized above, indicates that substantial percentages of asthmatic children at moderate or greater exertion would be exposed, at least once annually, to air quality exceeding the 400 and 200 ppb benchmarks. Moreover, in addition to the health evidence and risk-based information, the Administrator agrees with CASAC's conclusion that the current SO_2 standards do not adequately protect the public's health.

In considering approaches to revising the current standards, the Administrator is proposing that it is appropriate to consider setting a new short-term standard. The Administrator initially notes that a 1-hour standard could provide increased public health protection, especially for members of at-risk groups, from health effects described in both controlled human exposure and epidemiologic studies, and hence, health effects associated with 5-minute to 24-hour exposures to SO_2. As discussed in section II.F.5 below, depending on the degree of protection afforded by such a standard, it may be appropriate to replace, and not retain, the current 24-hour and annual standards in conjunction with setting a new short-term standard.

F. Conclusions on the elements of a proposed new short-term standard

In considering alternative SO_2 primary NAAQS, the Administrator notes the need to protect at-risk populations from: (1) 1-hour daily maximum and 24-hour average exposures to SO_2 that could cause the types of respiratory morbidity effects reported in epidemiologic studies; and (2) 5–10 minute SO_2 exposure concentrations reported in controlled human exposure studies to result in moderate or greater lung function responses and/or respiratory symptoms. Considerations with regard to potential alternative standards and the specific options being proposed are discussed in the following sections in terms of indicator, averaging time, form, and level (sections II.F.1 to II.F.4).

1. Indicator

In the last review, EPA focused on SO_2 as the most appropriate indicator for ambient SO_X. In making a decision in the current review on the most appropriate indicator, the Administrator has considered the conclusions of the ISA and REA as well as the views expressed by CASAC. The REA noted that, although the presence of gaseous SO_X species other than SO_2 has been recognized, no alternative to SO_2 has been advanced as being a more appropriate surrogate for ambient gaseous SO_X. Controlled human exposure studies and animal toxicology studies provide specific evidence for health effects following exposure to SO_2. Epidemiologic studies also typically report levels of SO_2, as opposed to other gaseous SO_X. Because emissions that lead to the formation of SO_2 generally also lead to the formation of other SO_X oxidation products, measures leading to reductions in population exposures to SO_2 can generally be expected to lead to reductions in population exposures to other gaseous SO_X. Therefore, meeting an SO_2 standard that protects the public health can also be expected to provide protection against potential health effects that may be independently associated with other gaseous SO_X even though such effects are not discernable from currently available studies indexed by SO_2 alone. See *American Petroleum Institute* v. *EPA,* 665 F, 2d 1176, 1186 (DC Cir. 1981) (reasonable for EPA to use ozone as the indicator for all photochemical oxidants even though

health information on the other photochemical oxidants is unknown; regulating ozone alone is reasonable since it presents a ''predictable danger'' and in doing so EPA did not abandon its responsibility to regulate other photochemical oxidants encompassed by the determination that photochemical oxidants as a class may be reasonably anticipated to endanger public health or welfare). Given these key points, the REA concluded that the available evidence supports the retention of SO_2 as the indicator in the current review (REA, section 10.5.1). Consistent with this conclusion, CASAC stated in a letter to the EPA Administrator that ''for indicator, SO_2 is clearly the preferred choice'' (Samet 2009, p. 14). The Administrator agrees with this consensus, and therefore proposes to retain SO_2 as the indicator for oxides of sulfur in the current review.

2. Averaging time

In considering whether it is appropriate to revise the averaging times of the current standards, the first consideration is what health effects the standard is addressing, and specifically whether those effects are associated with short-term (*i.e.,* 5-minutes to 24-hours), and/or long-term (*i.e.* weeks to years) exposure to SO_2. There are distinct differences in the causality judgments in the ISA as to short-term versus long-term health effects of SO_2. The ISA found evidence relating long-term (weeks to years) SO_2 exposures to adverse health effects to be ''inadequate to infer the presence or absence of a causal relationship'' (ISA, Table 5–3). In contrast, the ISA judged evidence relating short-term (5-minutes to 24-hours) SO_2 exposure to respiratory morbidity to be ''sufficient to infer a causal relationship'' (the strongest possible conclusion as to causality) and short-term exposure to SO_2 and mortality to be ''suggestive of a causal relationship'' (ISA, Table 5–3). Taken together, the REA concluded that these judgments most directly supported standard averaging time(s) that focus protection on SO_2 exposures from 5-minutes to 24-hours (REA, section, 10.5.2).

a. Evidence and air quality, exposure, and risk-based considerations

In considering the level of support available for specific short-term averaging times, the REA noted the strength of evidence from human exposure and epidemiologic studies evaluated in the ISA. As previously mentioned, controlled human exposure studies exposed exercising asthmatics to 5–10 minute peak concentrations of SO_2 and consistently found decrements in lung function and/or respiratory symptoms. Importantly, the ISA described the controlled human exposure studies as being the ''definitive evidence'' for its conclusion that there exists a causal association between short-term (5-minutes to 24-hours) SO_2 exposure and respiratory morbidity (ISA, section 5.2). In addition to the controlled human exposure evidence, there is a relatively small body of epidemiologic studies describing positive associations between 1-hour daily maximum SO_2 levels and respiratory symptoms as well as hospital admissions and ED visits for all respiratory causes and asthma (ISA Tables 5.4 and 5.5). In addition to the evidence from these 1-hour daily maximum epidemiologic studies, there is a considerably larger body of epidemiologic studies reporting positive associations between 24-hour average SO_2 levels and respiratory symptoms, as well as hospitalizations and ED visits for all respiratory causes and asthma. Moreover, with respect to these epidemiologic studies, there is support that adverse respiratory effects are more likely to occur at the upper end of the distribution of ambient SO_2 concentrations (see section II.F.3 on Form). In addition, when describing epidemiologic studies observing positive associations between ambient SO_2 and respiratory symptoms, the ISA stated ''that it is possible that these associations are determined in large part by peak exposures within a 24-hour period'' (ISA, section 5.2 at p. 5–5). Similarly, the ISA stated that: ''the effects of SO_2 on respiratory symptoms, lung function, and airway inflammation observed in the human clinical studies using peak exposures further provides a basis for a progression of respiratory morbidity resulting in increased ED visits and hospital admissions'' and makes the associations observed in the epidemiologic studies ''biologica[lly] plausib[le]'' (ISA, section 5.2 at p. 5–5).

The controlled human exposure evidence described above provided support for an averaging time that protects against 5–10 minute peak SO_2 exposures (REA, section 10.5.2). In addition, the REA found that results from epidemiologic studies provided support for both 1-hour and 24-hour averaging times (REA, section 10.5.2). In addition, both the epidemiologic and controlled human exposure evidence suggests that a new short-term standard should be focused on limiting peak SO_2 exposures. Thus, it can reasonably be concluded from the ISA and REA that it would be appropriate to consider the degree of protection potential alternative standards with averaging times under consideration provide against peak 5-minute to 24-hour SO_2 exposures. Moreover, as fully discussed in section II.F.3, this same information makes it reasonable that the form of a new short-term standard reflect a strategy to limit peak SO_2 exposures. Thus, with respect to the analyses presented below regarding averaging time, a 99th percentile form will be considered. See *American Petroleum Institute,* 665 F. 2d at 1186 (selection of highest average ozone level in one hour to determine compliance with ozone NAAQS is reasonable ''because it is calculated to measure the maximum exposure, which has been found to be a relevant factor in determining the likely consequences of ozone exposure'').

In considering the level of support available for specific short-term averaging times, the policy assessment chapter of the REA also took into account air quality considerations. More specifically, since the shortest averaging time for the current primary SO_2 standard is 24-hours, the REA evaluated the potential for a standard based on 24-hour average SO_2 concentrations to limit 5-minute peak SO_2 exposures (REA, section 10.5.2). The REA evaluated ratios between 99th percentile 5-minute daily maximum and 99th percentile 24-hour average SO_2 concentrations for 42 monitors reporting measured 5-minute data for any year between 2004–2006 (REA, Table 10–1). Across this set of monitors, ratios of 99th percentile 5-minute daily maximum to 99th percentile 24-hour average SO_2 concentrations spanned a range of 2.0 to 14.1 (REA, Table 10–1). These results suggested a standard based on 24-hour average SO_2 concentrations would not likely be an effective or efficient approach for addressing 5-minute peak SO_2 concentrations. That is, the REA concluded using a 24-hour average standard to address 5-minute peaks would likely result in over-controlling in some areas, while under-controlling in others (REA, section 10.5.2). This analysis also suggested that a 5-minute standard would not likely be an effective or efficient means for controlling 24-hour average SO_2 concentrations (REA, section 10.5.2).

The REA also reported ratios between 99th percentile 5-minute daily maximum and 99th percentile 1-hour daily maximum SO_2 levels from this set of monitors. Compared to the ratios discussed above (5-minute daily maximum to 24-hour average), there was far less variability between 5-

minute daily maximum and 1-hour daily maximum ratios. More specifically, 39 of the 42 monitors had 99th percentile 5-minute daily maximum to 99th percentile 1-hour daily maximum ratios in the range of 1.2 to 2.5 (REA, Table 10–1). The remaining three monitors had ratios of 3.6, 4.2 and 4.6 respectively. Overall, the REA found that this relatively narrow range of ratios (compared to the range of ratios presented above with respect to 5-minute daily maximum to 24-hour average) suggested that a standard with a 1-hour averaging time would be more efficient and effective at limiting 5-minute peaks of SO_2 than a standard with a 24-hour averaging time (REA, section 10.5.2.2). This analysis also suggested that a 5-minute standard could be a relatively effective means of controlling 1-hour daily maximum SO_2 concentrations.[19]

The REA further evaluated the potential of the 1-hour daily maximum standards analyzed in the air quality, exposure, and risk analyses to limit peak 24-hour average SO_2 exposures (REA, section 10.5.2) since there is epidemiologic evidence to suggest that adverse respiratory effects are more likely to occur at the upper end of the distribution of ambient SO_2 concentrations. The 99th percentile 24-hour average SO_2 concentrations in cities where U.S. ED visit and hospitalization studies (for all respiratory causes and asthma; identified from Table 5–5 of the ISA) were conducted ranged from 16 ppb to 115 ppb (Thompson and Stewart, 2009). Moreover, effect estimates that remained statistically significant in multi-pollutant models with PM were found in cities with 99th percentile 24-hour average SO_2 concentrations ranging from approximately 36 ppb to 64 ppb. The REA found that a 99th percentile 1-hour daily maximum standard set at a level of 50–100 ppb would generally limit 99th percentile 24-hour average SO_2 concentrations in locations where epidemiologic studies reported statistically significant results in multi-pollutant models with PM (Table 1). That is, for 2004, given air quality adjusted to just meet a 50 ppb 99th percentile 1-hour daily maximum standard, the REA found that no county included in this analysis was estimated to have 24-hour average SO_2 concentrations ≥ 36 ppb (Table 1). In addition, given air quality adjusted to just meet a 100 ppb 99th percentile 1-hour daily maximum standard, only 6 of the 39 counties (Linn, Union, Bronx, Fairfax, Hudson, and Wayne) included in this 2004 analysis were estimated to have 99th percentile 24-hour average SO_2 concentrations ≥ 36 ppb (Table 1). The REA repeated this analysis for the years 2005 and 2006 and found similar results (REA, Appendix Tables D1 and D2).[20]

TABLE 1—99TH PERCENTILE 24-HOUR AVERAGE SO_2 CONCENTRATIONS FOR 2004 GIVEN JUST MEETING THE ALTERNATIVE 1-HOUR DAILY MAXIMUM 99TH AND 98TH PERCENTILE POTENTIAL STANDARDS ANALYZED IN THE AIR QUALITY ASSESSMENT

[Source: REA, Table 10–2].[21]

State	County	1-hour daily maximum standards						
		99th percentile					98th percentile	
		50	100	150	200	250	100	200
AZ	Gila	6	12	18	25	31	16	32
DE	New Castle	12	23	35	47	59	28	56
FL	Hillsborough	10	20	30	40	50	28	55
IL	Madison	12	24	36	48	60	28	56
IL	Wabash	7	13	20	27	33	19	38
IN	Floyd	8	15	23	31	39	20	41
IN	Gibson	9	18	27	36	45	20	41
IN	Lake	12	24	36	48	60	31	62
IN	Vigo	10	19	29	39	48	24	48
IA	Linn	21	42	64	85	106	49	98
IA	Muscatine	17	34	51	68	85	38	76
MI	Wayne	17	33	50	66	83	37	74
MO	Greene	12	24	36	48	60	31	62
MO	Jefferson	9	18	27	36	45	25	51
NH	Merrimack	17	33	50	66	83	39	79
NJ	Hudson	19	38	57	76	95	48	96
NJ	Union	18	36	54	72	90	44	89
NY	Bronx	23	47	70	93	117	54	107
NY	Chautauqua	13	27	40	54	67	32	65
NY	Erie	14	27	41	54	68	30	61
OH	Cuyahoga	17	34	51	67	84	40	80
OH	Lake	10	19	29	39	48	23	47
OH	Summit	12	24	36	48	61	27	55
OK	Tulsa	16	32	47	63	79	36	72
PA	Allegheny	12	23	35	47	59	30	60
PA	Beaver	10	20	30	40	51	25	49
PA	Northampton	11	23	34	45	56	36	72
PA	Warren	11	22	33	44	56	28	56
PA	Washington	15	31	46	62	77	36	71
TN	Blount	15	31	46	61	77	35	71

[19] The analysis of peak to mean ratios was used as an initial screen to evaluate which averaging times could be suited to control 5-minute peaks of SO_2. The more sophisticated analysis for ultimately determining that a one-hour averaging time set at an appropriate level could effectively limit these 5-minute peaks was the air quality, exposure, and risk analyses discussed in section II.F.4.

[20] In 2005, given a 99th percentile 1-hour daily maximum standard at 50 ppb, Wayne County, West Virginia would have an estimated 99th percentile 24-hour average SO_2 concentration > 36 ppb (43 ppb; REA Appendix Table D–1).

TABLE 1—99TH PERCENTILE 24-HOUR AVERAGE SO_2 CONCENTRATIONS FOR 2004 GIVEN JUST MEETING THE ALTERNATIVE 1-HOUR DAILY MAXIMUM 99TH AND 98TH PERCENTILE POTENTIAL STANDARDS ANALYZED IN THE AIR QUALITY ASSESSMENT—Continued

[Source: REA, Table 10–2].[21]

State	County	1-hour daily maximum standards						
		99th percentile					98th percentile	
		50	100	150	200	250	100	200
TN	Shelby	17	34	51	68	85	41	81
TN	Sullivan	8	16	24	32	39	23	46
TX	Jefferson	9	17	26	35	44	21	41
VA	Fairfax	23	46	69	92	116	52	103
WV	Brooke	12	24	37	49	61	31	62
WV	Hancock	15	29	44	58	73	35	69
WV	Monongalia	10	20	30	40	50	25	51
WV	Wayne	30	59	89	119	149	67	133
VI	St Croix	14	27	41	54	68	51	101

The air quality information presented above strongly support the likelihood that an alternative 99th percentile (see discussion of form below in II.F.3) 1-hour daily maximum standard set at an appropriate level (see discussion of level in II.F.4) can substantially reduce the upper end of the distribution of SO_2 levels more likely to be associated with adverse respiratory effects; that is: (1) 99th percentile 1-hour daily maximum air quality concentrations in cities observing positive effect estimates in epidemiologic studies of hospital admissions and ED visits for all respiratory causes and asthma; and (2) 99th percentile 24-hour average air quality concentrations found in U.S. cities where ED visit and hospitalization studies (for all respiratory causes and asthma) observed statistically significant associations in multi-pollutant models with PM (*i.e.,* 99th percentile 24-hour average SO_2 concentration ≥ 36 ppb). In addition, based on the air quality and exposure analyses presented in chapters 7 and 8 of the REA, there is also a strong likelihood that a 99th percentile 1-hour daily maximum standard will limit 5–10 minute peaks of SO_2 shown in human exposure studies to result in decrements in lung function and/or respiratory symptoms in exercising asthmatics (see especially: REA Tables 7–11 to 7–14 and Figure 8–19). Such analyses are also summarized in section II.F.4 of this notice. Taken together, these results support that a 1-hour daily maximum standard, with an appropriate form and level, can provide adequate protection against the range of health outcomes associated with averaging times from 5-minutes to 24-hours (REA, section 10.5.2.3).

The REA also considered the possibility of a 5-minute averaging time based solely on the controlled human exposure evidence. However, the REA did not favor such an approach (REA 10.5.2.3). As in past NAAQS reviews, the stability of the design of pollution control programs in considering the elements of a NAAQS was considered, since more stable programs are more effective, and hence result in enhanced public safety. *American Trucking Associations* v. *EPA,* 283 F. 3d 355, 375 (DC Cir. 2002) (choice of 98th percentile form for 24-hour PM NAAQS, which allows a number of high exposure days per year to escape regulation under the NAAQS, justifiable as ''promot[ing] development of more 'effective [pollution] control programs' '', since such programs would otherwise be ''less 'stable'—and hence * * * less effective—than programs designed to address longer-term average conditions'', and there are other means (viz. emergency episode plans) to control those high exposure days). In this review, there were concerns about the stability of a standard using a 5-minute averaging time. Specifically, there was concern that compared to longer averaging times (*e.g.,* 1-hour, 24-hour), year-to-year variation in 5-minute SO_2 concentrations were likely to be substantially more temporally and spatially diverse. Thus, it is likely that locations would frequently shift in and out of attainment thereby reducing public health protection by disrupting an area's ongoing implementation plans and associated control programs. Consequently, the REA concluded that a 5-minute averaging time would not provide a stable regulatory target and therefore would not be the preferred approach to provide adequate public health protection. However, as noted above, analyses in the REA support that a 1-hour averaging time, given an appropriate form and level (discussed below in sections II.F.3 and II.F.4, respectively) can adequately limit 5-minute SO_2 exposures and provide a more stable regulatory target than setting a 5-minute standard.

b. CASAC views

CASAC agreed with the conclusions of the policy assessment chapter of the REA that a primary consideration of the SO_2 NAAQS should be the protection provided against health effects associated with short-term exposures. In their letter to the EPA Administrator, CASAC stated that they were ''in agreement with having a short-term standard and finds that the REA supports a one-hour standard as protective of public health'' (Samet 2009, p. 1). Furthermore, CASAC agreed with the REA that a ''one-hour standard is the preferred averaging time'' (Samet 2009, p.15).''

c. Administrator's conclusions on averaging time

In considering the most appropriate averaging time(s) for the SO_2 primary NAAQS, the Administrator notes the conclusions and judgments made in the ISA about the available scientific evidence, conclusions from the REA, and CASAC recommendations discussed above. Based on these considerations, the Administrator proposes to set a new standard based on 1-hour daily maximum SO_2

[21] 99th or 98th percentile 1-hour daily maximum concentrations were determined for each monitor in a given county for the years complete data were available from 2004–2006. These concentrations were averaged, and the monitor with the highest average in a given county was determined. Based on this highest average, all monitors in a given county were adjusted to just meet the potential alternative standards defined above, and for each of the years, the 99th percentile 24-hour average SO_2 concentration was identified. Results for the years 2005 and 2006 are presented in the REA, Appendix D.

concentrations to provide increased protection against effects associated with short-term (5-minutes to 24-hours) exposures. First, the Administrator agrees with the REA's conclusion that the standard should focus protection on short-term SO_2 exposures from 5-minutes to 24-hours. As noted above, CASAC's strong recommendation supports this approach as well. Second, the Administrator agrees that the standard must provide requisite protection from 5–10 minute exposure events (the critical issue in the previous review), but believes (subject to consideration of public comment) that this can be done without having a standard with a 5-minute averaging time. The Administrator agrees with the REA conclusion that it is likely a 1-hour standard—with the appropriate form and level—can substantially reduce 5–10 minute peaks of SO_2 shown in controlled human exposure studies to result in respiratory symptoms and/or decrements in lung function in exercising asthmatics. The Administrator further believes that a 5-minute averaging time would result in significant and unnecessary instability and is undesirable for that reason. The Administrator also notes the statements from CASAC addressing whether a one-hour averaging time can adequately control 5–10 minute peak exposures and whether there should be a 5-minute averaging time. CASAC stated that the REA had presented a ''convincing rationale'' for a one-hour standard, and that ''a 1-hour standard is the preferred averaging time'' (Samet 2009, p. 16).

Third, the Administrator agrees that a one-hour averaging time (again, with the appropriate form and level) would provide protection against the range of health outcomes associated with averaging times of one hour to 24 hours. Specifically, the Administrator finds that a 1-hour standard can substantially reduce the upper end of the distribution of SO_2 levels more likely to be associated with adverse respiratory effects; that is: (1) 99th percentile 1-hour daily maximum air quality concentrations in U.S. cities where positive effect estimates in epidemiologic studies of hospital admissions and ED visits for all respiratory causes and asthma were observed; and (2) 99th percentile 24-hour average air quality concentrations found in U.S. cities where ED visit and hospitalization studies (for all respiratory causes and asthma) observed statistically significant associations in multi-pollutant models with PM. Finally, the Administrator notes that the proposal to establish a new 1-hour averaging time is in agreement with CASAC recommendations. As noted above, CASAC stated that they were ''in agreement with having a short-term standard and finds that the REA supports a one-hour standard as protective of public health'' (Samet, 2009, p. 1).

3. Form

When evaluating alternative forms in conjunction with specific levels, the REA considered the adequacy of the public health protection provided by the combination of level and form to be the foremost consideration. In addition, the REA recognized that it is important that the standard have a form that is reasonably stable. As just explained in the context of a five-minute averaging time, a standard set with a high degree of instability could have the effect of reducing public health protection because shifting in and out of attainment could disrupt an area's ongoing implementation plans and associated control programs.

a. Evidence, air quality, and risk-based considerations

As previously mentioned, the policy chapter of the REA (chapter 10) recognized that the adequacy of the public health protection provided by a 1-hour daily maximum potential alternative standard will be dependent on the combination of form and level. It is therefore important that the particular form selected for a 1-hour daily maximum potential alternative standard reflect the nature of the health risks posed by increasing SO_2 concentrations. That is, the REA noted that the form of the standard should reflect results from controlled human exposure studies demonstrating that the percentage of asthmatics affected, and the severity of the respiratory response (*i.e.* decrements in lung function, respiratory symptoms) increases as SO_2 concentrations increase. Taking this into consideration, the REA concluded that a concentration-based form, averaged over three years, is more appropriate than an exceedance-based form (REA, section 10.5.3). This is because a concentration-based form averaged over three years would give proportionally greater weight to years when 1-hour daily maximum SO_2 concentrations are well above the level of the standard, than to years when 1-hour daily maximum SO_2 concentrations are just above the level of the standard. In contrast, an expected exceedance form would give the same weight to years when 1-hour daily maximum SO_2 concentrations are just above the level of the standard, as to years when 1-hour daily maximum SO_2 concentrations are well above the level of the standard. Therefore, the REA concluded that a concentration-based form, averaged over three years (which also increases the stability of the standard) better reflects the continuum of health risks posed by increasing SO_2 concentrations (*i.e.* the percentage of asthmatics affected and the severity of the response increases with increasing SO_2 concentrations; REA, section 10.5.3).

The form of the standard should also reflect health information in the ISA that suggests that adverse respiratory effects are more likely to occur at the upper end of the distribution of ambient SO_2 concentrations. Specifically, a few studies found that the increase in SO_2-related respiratory health effects was observed at the upper end of the distribution of SO_2 concentrations (ISA, section 5.3, p. 5–9). For example, an epidemiologic study conducted in Bronx, NY suggested an increased risk of asthma hospitalizations on the days with the highest SO_2 concentrations (Lin *et al.,* 2004). More specifically, the authors observed an increasing linear trend with respect to asthma hospitalizations across the range of SO_2 concentrations, with more marked effects observed at SO_2 concentrations somewhere between the 90th and 95th percentiles (ISA, section 4.1.2 and ISA, Figure 4–4).

The epidemiologic evidence is consistent with the large body of controlled human exposure studies of exercising asthmatics exposed to short-term peak concentrations of SO_2; these controlled human exposure studies provide the ''definitive evidence'' that short term peak SO_2 exposure is associated with respiratory morbidity (SO_x ISA, Section 5.3, page 5–2). These studies consistently found moderate or greater decrements in lung function (*i.e.* $\geq$ 100% increase in sRaw and/or $\geq$ 15% decline in FEV_1)[22] and/or respiratory symptoms in exercising asthmatics following 5–10 minute peak exposures to SO_2. Moreover, as noted in the discussion on averaging time (section II.F.2), when discussing the possible relationship between effects observed in controlled human exposure studies and associations reported in epidemiologic analyses, the ISA stated with respect to epidemiologic studies of respiratory symptoms: ''it is possible that these associations are determined in large part by peak exposures within a 24-hour period'' (ISA, section 5.2 at p. 5–5). Similarly, the ISA stated that: ''the effects of SO_2 on respiratory symptoms,

[22] See section II.B.1.b above explaining sRaw and FEV1.

lung function, and airway inflammation observed in the human clinical studies using peak exposures further provides a basis for a progression of respiratory morbidity resulting in increased ED visits and hospital admissions'' and makes the associations observed in the epidemiologic studies ''biologica[lly] plausib[le]'' (ISA, section 5.2 at p. 5–5). Thus, both the epidemiologic and controlled human exposure evidence suggests that the form of the standard should be focused on limiting peak SO_2 exposures.

In considering specific concentration-based forms, the REA recognized the importance of: (1) Minimizing the number of days per year that an area could exceed the level of the standard and still attain the standard and thus, limiting the upper end of the distribution of SO_2 levels most likely associated with adverse respiratory effects (2) limiting the prevalence of 5-minute peaks of SO_2; and (3) providing a stable regulatory target to prevent areas from frequently shifting in and out of attainment. The REA focused on 98th and 99th percentile forms averaged over 3 years. The REA first noted that in most locations analyzed, the 99th percentile form of a 1-hour daily maximum standard would correspond to the 4th highest daily maximum concentration in a year, while a 98th percentile form would correspond approximately to the 7th to 8th highest daily maximum concentration in a year (REA, Table 10–5 and Thompson, 2009). In addition, results from the REA air quality analysis suggested that at a given SO_2 standard level, a 99th percentile form is appreciably more effective at limiting 5-minute peak SO_2 concentrations than a 98th percentile form (REA, section 10.5.3 and REA, Figures 7–27 and 7–28). For example, the REA reported that compared to the same standard with a 99th percentile form, a 98th percentile 1-hour daily maximum standard set at a level of 100 ppb allows for on average, an estimated 90 and 74% more days per year when SO_2 concentrations would likely exceed the 200 and 400 ppb benchmark values respectively (REA, section 10.5.3 and REA, Figure 7–28). Moreover, in the counties selected for analysis in the REA air quality assessment, the estimated number of benchmark exceedances using a 98th percentile 1-hour daily maximum standard set at a level of 200 ppb was similar to the corresponding 99th percentile standard set at a level of 250 ppb (REA, section 10.5.3 and REA, Tables 7–11 through 7–14). Similarly, the estimated number of benchmark exceedances considering a 98th percentile standard set at a level of 100 ppb fell within the range of benchmark exceedances estimated for 99th percentile standards set at levels of 100 and 150 ppb (*id.*).

As an additional matter, the REA compared trends in 98th and 99th percentile design values, as well as design values based on the 4th highest daily maximum from 54 sites located in the 40 counties selected for the detailed air quality analysis (REA section 10.5.3 and Thompson, 2009). These results suggested that at the vast majority of sites, there would have been similar changes in 98th and 99th percentile design values over the last ten years (*i.e.* based evaluating overlapping three year intervals over the last ten years; see REA, Figure 10–1 and Thompson, 2009). These results also demonstrated that design values based on the 4th highest daily maximum are virtually indistinguishable from design values based on the 99th percentile (REA, Figure 10–1 and Thompson, 2009). As part of this analysis, all of the design values over this ten year period for all 54 sites were aggregated and the standard deviation calculated (REA, Figure 10–2 and Thompson, 2009). Results demonstrated similar standard deviations—*i.e.* similar stability—based on aggregated 98th or aggregated 99th percentile design values over the ten year period (see REA, Figure 10–2 and Thompson 2009).

Considering the evidence and air quality analyses presented above, the REA concluded that a concentration-based form provides the best protection against the health risks posed by increasing SO_2 concentrations (REA, section 10.5.3). Moreover, the REA found that at a given standard level, a 99th percentile or 4th highest daily maximum form provides appreciably more public health protection against 5-minute peaks than a 98th percentile or 7th—8th highest daily maximum form (REA, section 10.5.3). In addition, over the last 10 years and for the vast majority of the sites examined, there appears to be little difference in 98th and 99th percentile design value stability (REA, section 10.5.3). Thus, the REA ultimately concluded that consideration should be given primarily to a 1-hour daily maximum standard with a 99th percentile or 4th highest daily maximum form (REA, section 10.5.3.3).

b. CASAC views

CASAC agreed with the importance of considering the public health protection provided by the combination of form and level. Moreover, CASAC was in general agreement with the forms being considered. In a letter to the Administrator, CASAC stated: ''there is adequate information to justify the use of a concentration-based form averaged over 3 years'' (Samet 2009, p. 16). Moreover, when considering 98th vs. 99th percentile forms, CASAC encouraged EPA to consider analyses in the REA (and perhaps additional analyses) with respect to the number of days per year 98th vs. 99th percentile forms would allow SO_2 concentrations to exceed the selected level. CASAC also encouraged EPA to consider analyses such as those presented above with respect to the number exceedences of 5-minute benchmarks given 98th vs. 99th percentile forms at a given standard level (Samet 2009).

c. Administrator's conclusions on form

When considering alternative forms, the Administrator notes and agrees with the views expressed in the REA and the recommendations from CASAC, as described above. In particular, she agrees that the standard should use a concentration-based form averaged over three years in order to give due weight to years when 1-hour SO_2 concentrations are well above the level of the standard, than to years when 1-hour SO_2 concentrations are just above the level of the standard. The Administrator agrees further, for the reasons given above, that a 99th percentile (or 4th highest) form could be appreciably more protective than a 98th (or 7th or 8th highest) form, and thus, should be utilized. Given these considerations, and in light of the specific range proposed for level below, the Administrator proposes to adopt either a 99th percentile or a 4th highest form, averaged over 3 years.

4. Level

In assessing the level of a one-hour standard with either a 99th percentile or 4th highest average form (averaged over three years in either case) to propose, the Administrator has considered the broad range of scientific evidence assessed in the ISA, including the epidemiologic studies and controlled human exposure studies, as well as the results of air quality, exposure, and risk analyses presented in the REA. In light of this body of evidence and analyses, the Administrator reiterates that it is necessary to provide increased public health protection for at-risk populations against an array of adverse respiratory health effects related to short-term (*i.e.,* 5 minutes to 24 hours) exposures to ambient SO_2. In considering the most appropriate way to provide this protection, the Administrator is mindful

of the extent to which the available evidence and analyses can inform a decision on the level of a standard. Specifically, the range of proposed standard levels discussed below is informed by epidemiologic and controlled human exposure studies.

a. Evidence-based considerations

Evidence-based considerations take into account the full body of scientific evidence assessed in the ISA. When considering the extent to which this scientific evidence can inform a decision on the level of a 1-hour standard, it is important to note that SO_2 concentrations represent different measures of exposure when drawn from experimental versus epidemiologic studies. Concentrations of SO_2 tested in experimental studies, such as controlled human exposure studies, represent exposure concentrations in the breathing zone of the individual test subjects. In cases where controlled human exposure studies report effects, those effects are caused directly by exposure to a specified concentration of SO_2. In contrast, concentrations of SO_2 drawn from epidemiologic studies are often based on ambient monitoring data. SO_2 concentrations recorded at these ambient monitors are used as surrogates for the distribution of SO_2 exposures across the study area and over the time period of the study.

Since the last review, there have been more than 50 peer reviewed epidemiologic studies published worldwide dealing with SO_2 exposure and effects (see ISA Tables 5–4 and 5–5). Overall, the ISA concluded that these studies provide evidence of an association between ambient SO_2 concentrations and respiratory symptoms, as well as ED visits and hospitalizations for all respiratory causes and asthma (ISA, section 3.1.4). Moreover, the ISA indicates that many of these epidemiologic studies have reported that children and older adults may be at increased risk for SO_2-associated adverse respiratory effects (ISA, section 5.2). In assessing the extent to which these studies and their associated air quality information can inform the level of a new 99th percentile (see sections II.F.2 and II.F.3) 1-hour daily maximum standard for the U.S., the REA considered U.S. and Canadian air quality information to be most relevant. EPA sent a request to the authors of U.S. and Canadian epidemiologic studies (studies were identified from Tables 5–4 and 5–5 of the ISA) for 99th (and 98th) percentile 1-hour daily maximum SO_2 concentrations from the monitor recording the highest SO_2 level in the location and time period corresponding to their studies (see Thompson and Stewart (2009)). Air quality information was received from authors of both U.S. and Canadian studies; however, as noted in the REA (REA, section 5.5), SO_2 concentrations reported for Canadian studies are not directly comparable to those reported for studies in the U.S. because SO_2 levels reported for Canadian analyses represent the average 1-hour daily maximum level across multiple monitors in a given city (see REA Figure 5–5), rather than the concentration from the single monitor that recorded the highest SO_2 concentration (see Thompson and Stewart, 2009). Thus, the REA noted that SO_2 concentrations associated with Canadian studies would be relatively lower (potentially significantly lower) than those levels presented for U.S. epidemiologic studies, and therefore the REA focused on 99th percentile air quality information from U.S. studies for informing potential 1-hour standard levels.

Figures 1 to 4 present 99th (and 98th) percentile 1-hour daily maximum SO_2 concentrations from ten U.S. epidemiologic studies (some of which were conducted in multiple cities) of ED visits and hospital admissions [23] (Figures 5–1 to 5–4 in the REA). The REA noted that this information provides evidence for effects in cities with particular 99th percentile 1-hour SO_2 levels, and hence, was of particular relevance for identifying standard levels that could protect against the SO_2 concentrations observed in these studies. The air quality information presented in these figures generally shows that positive associations between ambient SO_2 concentrations and ED visit and hospitalizations have been reported in cities where 99th percentile 1-hour daily maximum SO_2 concentrations ranged from approximately 50–460 ppb. More specifically, seven of these studies were in cities where 99th percentile 1-hour daily maximum SO_2 concentrations ranged from approximately 75–150 ppb. Among these epidemiologic studies in the range of 75–150 ppb, there is a cluster of three studies reporting statistically significant results in multi-pollutant models with PM. Specifically, in epidemiologic studies conducted in the Bronx, NY (NYDOH 2006), and in NYC, NY (Ito *et al.,* 2007), the SO_2 effect estimate remained positive and statistically significant in multi-pollutant models with $PM_{2.5}$ in these locations when 99th percentile 1-hour daily maximum SO_2 levels were 78 and 82 ppb respectively. (ISA, Table 5–5). Moreover, in an epidemiologic study conducted in New Haven, CT (Schwartz *et al.,* 1995), the SO_2 effect estimate remained positive and statistically significant in a multi-pollutant model with PM_{10} in this location when the 99th percentile 1-hour daily maximum SO_2 concentration was 150 ppb. The REA noted that although statistical significance in co-pollutant models is an important consideration, it is not necessary for appropriate consideration of and reliance on such epidemiologic evidence.[24] However, as noted earlier, there is special sensitivity in this review in disentangling PM-related effects (especially sulfate PM) from SO_2-related effects in interpreting the epidemiologic studies; thus, these studies are of particular relevance here, lending strong support both to the conclusion that SO_2 effects are generally independent of PM (ISA, section 5.2) and that these independent adverse effects of SO_2 have occurred in cities with 1-hour daily maximum, 99th percentile concentrations in the range of 78–150 ppb.

In addition to the study locations where SO_2 concentrations ranged from 75–150 ppb, the REA noted that two epidemiologic studies included cities reporting positive associations between ambient SO_2 levels and ED visits when 99th percentile 1-hour daily maximum SO_2 concentrations were approximately 50 ppb (Wilson *et al.,* (2005) in Portland, ME and Jaffe *et al.,* (2003) in Columbus, OH). These studies reported generally positive and sometimes statistically significant results using single pollutant models (Figures 1 and 2), and did not evaluate potential confounding through the use of multi-pollutant models. Nonetheless, these studies provide limited evidence of an association between ED visits and 99th percentile 1-hour daily maximum SO_2 concentrations in locations where SO_2 levels were approximately 50 ppb. Finally, the REA noted that studies

[23] In some cases, U.S. authors provided the AQS monitor IDs used in their studies and the statistics from the highest reporting monitor were calculated by EPA. In cases where U.S. authors were unable to provide the requested data (Schwartz 1995, Schwartz 1996, and Jaffe 2003), EPA identified the maximum reporting monitor from all monitors located in the study area and calculated the 98th and 99th percentile statistics (see Thompson and Stewart 2009). Results presented from study locations for which effect estimates were reported.

[24] For example, evidence of a pattern of results from a group of studies that find effect estimates similar in direction and magnitude would warrant consideration of and reliance on such studies even if the studies did not all report statistically significant associations in single- or multi-pollutant models. The SO_2 epidemiologic studies fit this pattern, and are buttressed further by the results of the clinical studies. ISA, section 5.2.

conducted in Cleveland and Cincinnati, OH (Schwartz *et al.* 1996 and Jaffe *et al.* 2003) reported positive associations between ambient SO_2 levels and ED visits and hospital admissions when 99th percentile 1-hour daily maximum SO_2 concentrations in these cities ranged from 170–457 ppb (REA, section 5.5). The REA found the SO_2 level in Cincinnati (Jaffe *et al.,* 2003; REA section 5.5) to be of particular concern. The 99th percentile 1-hour daily maximum SO_2 level in Cincinnati was > 400 ppb (Figure 2), which in 5–10 minute controlled human exposure studies, was an SO_2 concentration range consistently shown to result in clearly adverse health effects in exercising asthmatics (*i.e.,* decrements in lung function accompanied by respiratory symptoms).

Taken together, the epidemiologic evidence described above suggests that standard levels at and below 75 ppb should be considered to limit SO_2 concentrations such that the upper end of the distribution of daily maximum hourly concentrations would likely be below that observed in most of these U.S. studies. Notably, a standard at or below 75 ppb would be lower than the SO_2 air quality levels found in the cluster of three epidemiologic studies finding statistically significant effects in multi-pollutant models with PM (*i.e.,* 99th percentile 1-hour daily maximum SO_2 concentrations ≥ 78 ppb). Moreover, standard levels at or below 75 ppb recognize the limited evidence from two epidemiologic studies reporting mostly positive and sometimes statistically significant associations in single pollutant models when 99th percentile 1-hour daily maximum SO_2 concentrations were approximately 50 ppb (Wilson *et al.,* (2005) in Portland, ME and Jaffe *et al.,* (2003) in Columbus, OH; see Figures 1 and 2). Judgments about the weight to place on uncertainties inherent in such studies should also inform selection of a specific standard level.

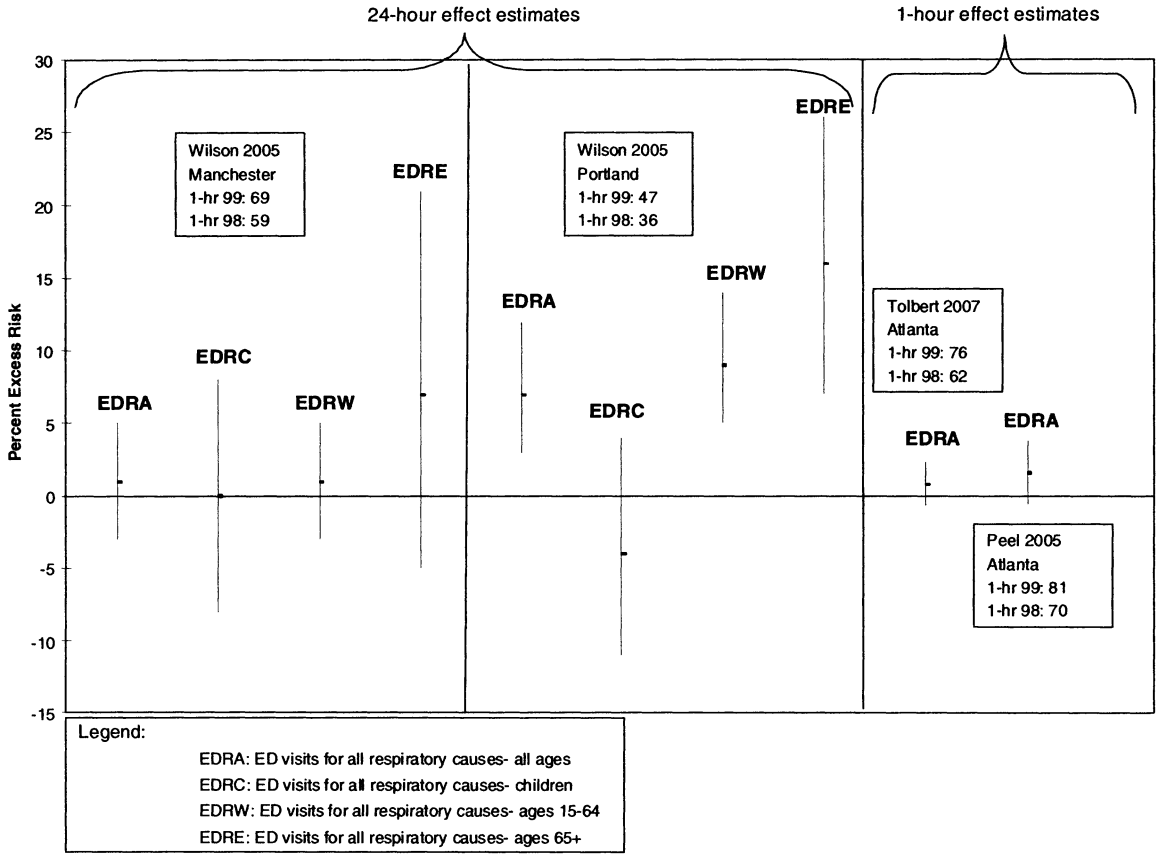

Figure 1. Effect estimates for U.S. all respiratory ED visit studies and associated 98th and 99th percentile 1-hour daily maximum SO_2 levels.

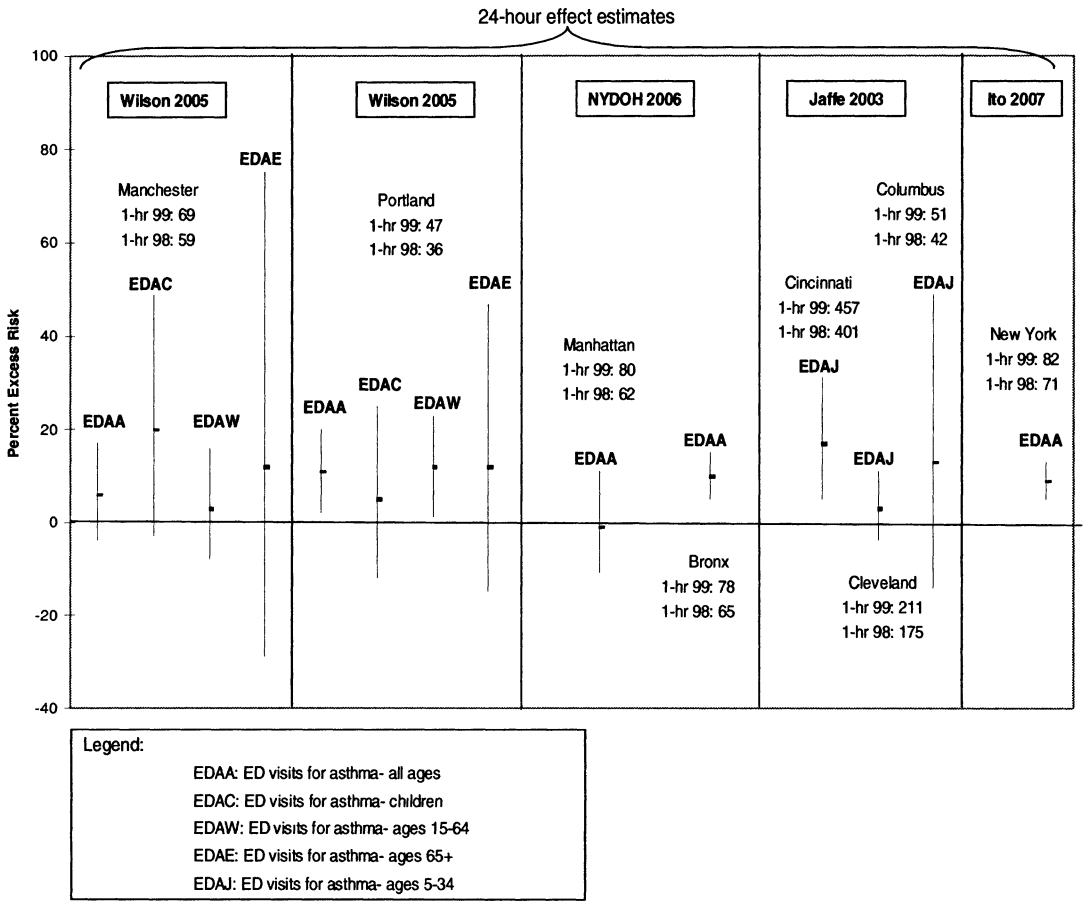

Figure 2. 24-hour effect estimates for U.S. asthma ED visit studies and associated 98th and 99th percentile 1-hour daily maximum SO_2 levels.

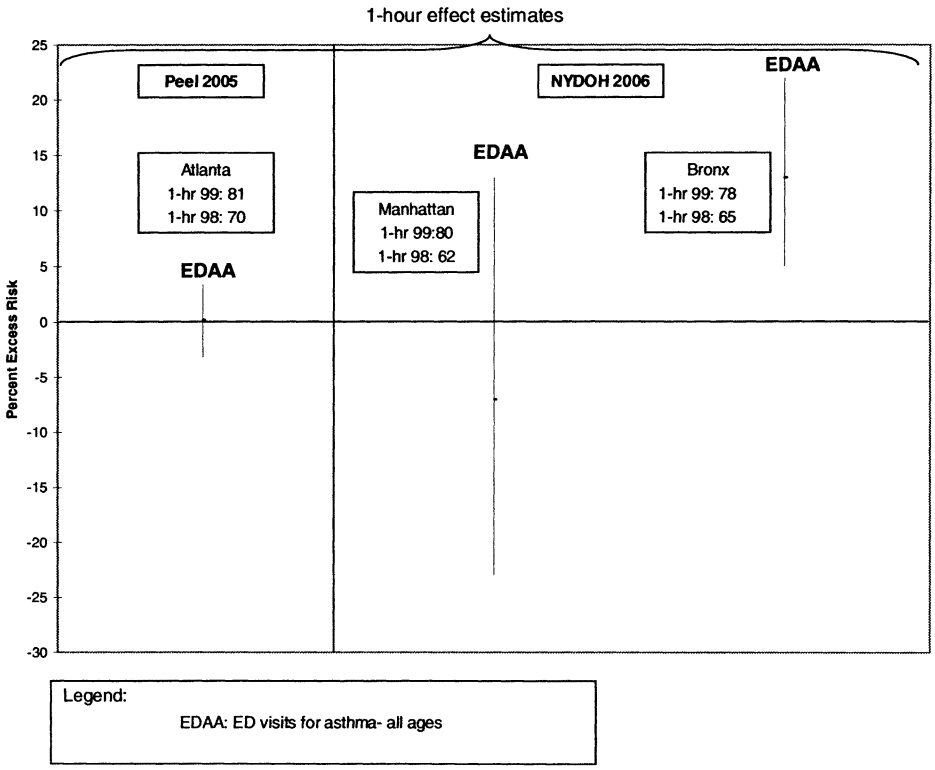

Figure 3. 1-hour effect estimates for U.S. asthma ED visit studies and associated 98th and 99th percentile 1-hour daily maximum SO_2 levels.

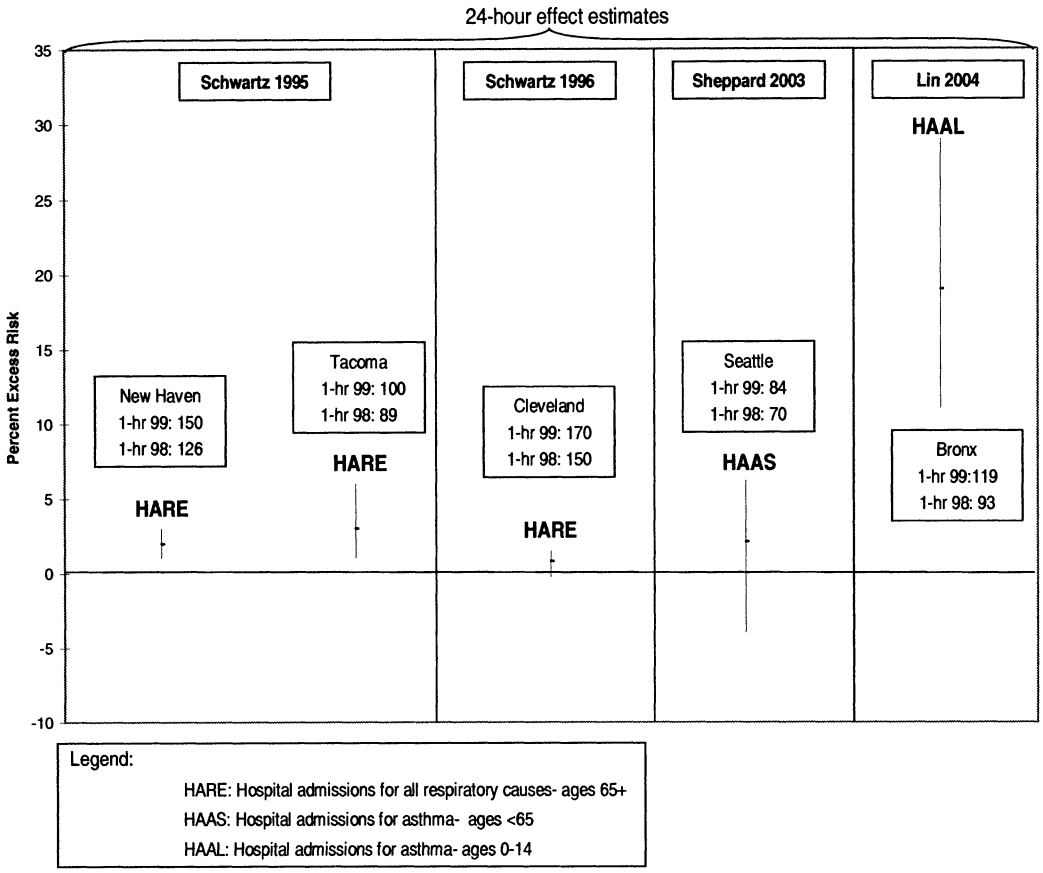

Figure 4. 24-hour effect estimates for U.S. hospitalization studies and associated 98th and 99th percentile 1-hour daily maximum SO_2 levels.[25]

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The REA also considered findings from controlled human exposure studies when evaluating potential alternative standard levels. The ISA found that the most consistent evidence of decrements in lung function and/or respiratory symptoms was from controlled human exposure studies exposing exercising asthmatics to SO_2 concentrations ≥ 400 ppb for 5–10 minute durations (ISA, section 3.1.3.5). As previously mentioned, at SO_2 concentrations ranging from 400–600 ppb, moderate or greater decrements in lung function occur in approximately 20–60% of exercising asthmatics, and compared to exposures at 200–300 ppb, a larger percentage of subjects experience severe decrements in lung function. Moreover, at concentrations ≥ 400 ppb, decrements in lung function are often statistically significant at the group mean level, and are frequently accompanied by respiratory symptoms (ISA, Table 5–1).

Controlled human exposure studies have also demonstrated decrements in lung function in exercising asthmatics following 5–10 minute SO_2 exposures starting as low as 200–300 ppb in free-breathing chamber studies. At concentrations ranging from 200–300 ppb, the lowest levels tested in free breathing chamber studies, approximately 5–30% percent of exercising asthmatics are likely to experience moderate or greater decrements in lung function in these studies. Moreover, although these individuals experienced lung function decrements, they were not frequently accompanied by respiratory symptoms and at these SO_2 concentrations, group mean changes in lung function have not been shown to be statistically significant. However, the ISA and REA noted that for evident ethical reasons, the subjects participating in the controlled human exposure studies described above do not include the most severe asthmatics. Thus, the REA found it is reasonable to anticipate that individuals who are more sensitive to SO_2 would have a greater response at 200–300 ppb SO_2, and/or would respond to SO_2 concentrations even lower than 200 ppb (REA, section 10.5.4). Similarly, the REA noted that there is no evidence to suggest that 200 ppb represents a threshold below which no adverse respiratory effects occur (REA, section 10.5.4). In fact, limited evidence from two mouthpiece exposure studies suggests that exposure to 100 ppb SO_2 can result in small decrements in lung function.[26]

Considering the controlled human exposure evidence presented above, the ISA concluded that as SO_2 concentrations increase the percentage of asthmatics affected increases as does the severity of the response. Moreover, as previously noted, effects associated with SO_2 concentrations ≥ 400 ppb are clearly considered adverse effects of air pollution under ATS guidelines, while effects at 200–300 ppb were considered adverse in the REA based on interpretation of ATS guidelines, CASAC recommendations, and previous conclusions from comparable situations in other NAAQS reviews (see section II.B.1.c). Taken together, the REA concluded that the level of a new 99th percentile 1-hour daily maximum

[25] There were no U.S. hospitalization studies with 1-hour effect estimates identified in Table 5–5 of the ISA.

[26] Although not directly comparable to free-breathing chamber studies, findings from these mouthpiece studies may be particularly relevant to those asthmatics who breathe oronasally even at rest (EPA, 1994b).

standard should provide substantial protection against SO_2 concentrations ≥400 ppb, and appreciable protection against 5-minute SO_2 concentrations ≥200 ppb (REA, section 10.5.4).

b. Air quality, exposure and risk-based considerations

In evaluating the extent to which 99th percentile 1-hour daily maximum alternative standard levels limit 5-minute SO_2 concentrations ≥400 and ≥200 ppb, the REA first considered key results of the air quality analysis. As previously noted, the results generated from the air quality analysis were from 40 counties and considered a broad characterization of national air quality and human exposures that might be associated with these 5-minute SO_2 concentrations (see section II.C). However, there is uncertainty associated with the assumption that SO_2 air quality measured at fixed site monitors can serve as an adequate surrogate for total exposure to ambient SO_2. Actual exposures might be influenced by factors not considered in this analysis including small scale spatial variability in ambient SO_2 concentrations (which might not be captured by the network of fixed-site ambient monitors) and spatial/temporal variability in human activity patterns.

Table 2 reports the maximum mean number of days per year 5-minute daily maximum SO_2 levels would be expected to exceed a given 5-minute potential health effect benchmark level in any of the 40 counties included in the air quality analysis, given air quality simulated to just meet the current, and potential alternative 99th percentile 1-hour daily maximum standards analyzed in the REA. In addition, although not directly analyzed in the REA, these tables include air quality results given a 99th percentile 1-hour daily maximum standard at 75 ppb; this concentration was included in these tables because as mentioned above, the epidemiologic evidence suggested consideration of a standard level at or below 75 ppb.[27] Table 2 shows that at standard levels ranging from 50–100 ppb, there would be at most two days per year when statistically estimated 5-minute SO_2 concentrations in these counties exceed the 400 ppb benchmark, while at standard levels of 150 ppb and above there is a marked increase in the maximum number of days per year the 400 ppb benchmark is exceeded. Similar trends are seen with respect to the 300 ppb benchmark level. With respect to the 200 and 100 ppb benchmarks, the 50 ppb standard is clearly the most effective at limiting these 5-minute SO_2 concentrations. However, compared to standards at 150 ppb and above, standards in the range of 75–100 ppb would allow considerably less exceedence of the 200 and 100 ppb benchmarks. Additional and more detailed results from the air quality analysis can be found in chapter 7 of the REA.

TABLE 2—MAXIMUM MEAN NUMBER OF DAYS PER YEAR IN ANY OF THE COUNTIES INCLUDED IN THE AIR QUALITY ANALYSIS WHEN 5-MINUTE DAILY MAXIMUM SO_2 CONCENTRATIONS EXCEED THE 100, 200, 300, AND 400 PPB POTENTIAL HEALTH EFFECT BENCHMARK VALUES GIVEN AIR QUALITY ADJUSTED TO JUST MEET THE CURRENT STANDARDS, OR ALTERNATIVE 99TH PERCENTILE 1-HOUR DAILY MAXIMUM STANDARDS

Exposure benchmarks (5-minute exposures)	Air quality scenarios						
	Just meeting current standards	99th percentile 1-hour daily maximum standards					
		50 ppb	75 ppb	100 ppb	150 ppb	200 ppb	250 ppb
400 ppb	102	0	(0–2)	2	7	13	18
300 ppb	130	0	(0–5)	5	13	20	27
200 ppb	171	2	(2–13)	13	24	42	69
100 ppb	234	13	(13–43)	43	93	133	180

While the air quality analysis results presented in Table 2 used estimated 5-minute SO_2 concentrations as a surrogate for exposure, the results from the exposure analysis considered the likelihood that an asthmatic at elevated ventilation rate would come into contact with a 5-minute SO_2 concentration at or above a given benchmark level one or more times per year. As previously noted, this resource intensive analysis was performed for St. Louis and Greene County, MO, but results from the St. Louis analysis were found to be more informative with respect to informing standard levels given that the St. Louis results: (1) Suggested that the current standards were not adequate to protect public health; and (2) likely provide useful insights into exposures and risk for other urban areas in the U.S. with similar population and SO_2 emissions density (*i.e.,* areas where SO_2 exposures are more likely).

Table 3 reports the estimated percent of asthmatic children at moderate or greater exertion in St. Louis, that would be expected to experience at least one SO_2 exposure per year, at or above a health effect benchmark level in scenarios in which air quality was adjusted to meet the current, and alternative 99th percentile 1-hour daily maximum standards. This analysis estimates that standard levels ranging from 50–100 ppb would protect > 99% of asthmatic children, at moderate or greater exertion, from experiencing at least one SO_2 exposure ≥ 400 ppb per year.[28] Similarly, a standard at 150 ppb is estimated to protect ~ 99% of asthmatic children at moderate or greater exertion from experiencing at least one SO_2 exposure ≥ 400 ppb. Compared to standards ranging from 50–150 ppb, standards at 200 and 250 ppb are estimated to allow appreciably more exposures ≥ 400 ppb (Table 3). With respect to the 300 ppb benchmark, standards at 50, 75, and 100 ppb provide similar protection, while there is a marked increase in exposures of asthmatic children at moderate or greater exertion at standard levels ≥ 150 ppb (Table 3). Considering the 200 ppb benchmark level, it is estimated that 1-hour standard levels ranging from 50–100 ppb limit 5-minute SO_2 exposures ≥ 200 ppb considerably more than 1-hour standard levels ≥ 150 ppb. More

[27] Air quality, exposure, and risk numbers reported in Chapter 10 of the REA for a 75 ppb standard were bound by the estimates from air quality adjusted to just meet 99th percentile 1-hour daily maximum standards at 50 and 100 ppb.

[28] Table 3 reports that given a 99th percentile 1-hour daily maximum standard in the range of 50–100 ppb, < 1% of asthmatic children at moderate or greater exertion would be estimated to experience an SO_2 exposure ≥ 400 ppb, hence it can be stated that this range of levels would protect > 99% of asthmatic children at moderate or greater exertion from experiencing at least one SO_2 exposure ≥ 400 ppb per year.

specifically, standards in the range of 50–100 ppb are estimated to protect approximately 97 to > 99% of asthmatic children at moderate or greater exertion from experiencing at least one 5-minute exposure ≥ 200 ppb per year, while standards ranging from 150–250 ppb are estimated to protect approximately 60 to 88% of these children from experiencing at least one 5-minute SO_2 exposure ≥ 200 ppb per year. Finally, similar to the air quality analysis, a standard at 50 ppb is clearly most effective at limiting 5-minute SO_2 exposures ≥ 100 ppb. Additional and more detailed results from the exposure assessment can be found in chapter 8 of the REA.

TABLE 3—ESTIMATED PERCENT OF ASTHMATIC CHILDREN IN ST. LOUIS AT MODERATE OR GREATER EXERTION EXPECTED TO EXPERIENCE AT LEAST ONE 5-MINUTE EXPOSURE ABOVE THE 100, 200, 300, AND 400 PPB POTENTIAL HEALTH EFFECT BENCHMARK LEVELS GIVEN AIR QUALITY ADJUSTED TO JUST MEET THE CURRENT STANDARDS, OR ALTERNATIVE 99TH PERCENTILE 1-HOUR DAILY MAXIMUM STANDARDS

Exposure benchmarks (5-minute exposures)	Air quality scenarios						
	Just meeting current standards	99th Percentile 1-hour daily maximum standards					
		50 ppb	75 ppb	100 ppb	150 ppb	200 ppb	250 ppb
400 ppb	24%	< 1%	< 1%	< 1%	~1%	2.7%	6.3%
300 ppb	43.8%	< 1%	< 1%	< 1%	2.7%	8%	16%
200 ppb	73.1%	< 1%	(~1 to 2.7%)	2.7%	11.6%	24.5%	40%
100 ppb	96.7%	2.7%	(2.7 to 24.5%)	24.5%	54.5%	73.6%	84.8%

In evaluating the extent to which alternative standard levels provide protection against the health effects associated with 5-minute SO_2 exposures, the REA also considered key results from the quantitative risk assessment (REA, chapter 9). Table 4 presents the percent of exposed asthmatic children at moderate or greater exertion in St. Louis expected to experience at least one moderate or greater lung function response per year, in terms of sRaw, given the 99th percentile 1-hour daily maximum standards analyzed in the REA. Results presented in Table 4 show that standard levels in the range of 100 to 150 ppb would generally be expected to protect approximately 95 to 98% of exposed asthmatic children at moderate or greater exertion from experiencing at least one ≥ 100% increase in sRaw per year, while standards around and below 75 ppb would be estimated to provide exposed asthmatic children with protection approaching 99% or greater. Additional and more detailed risk analyses can be found in chapter 9 of the REA.

TABLE 4—ESTIMATED PERCENT OF ASTHMATIC CHILDREN IN ST. LOUIS AT MODERATE OR GREATER EXERTION EXPECTED TO EXPERIENCE A ≥ 100% INCREASE IN SRAW GIVEN AIR QUALITY ADJUSTED TO JUST MEET EITHER THE CURRENT STANDARDS, OR ALTERNATIVE 99TH PERCENTILE 1-HOUR DAILY MAXIMUM STANDARDS

Air quality scenarios						
Just meeting current standards	99th Percentile 1-hour daily maximum standards					
	50 ppb	75 ppb	100 ppb	150 ppb	200 ppb	250 ppb
19.1–19.2%	0.4–0.9%	(0.4–2.9%)	2.1–2.9%	4.6–5.4%	7.4–8.1%	10.4–10.9%

c. Observations based on evidence and risk-based considerations

The policy assessment chapter of the REA considered the scientific evidence and the air quality, exposure, and risk information as they relate to considering alternative 1-hour SO_2 standards that could be judged to be requisite to protect public health with an adequate margin of safety. This evidence and information supports the following conclusions:

- Given the U.S. epidemiologic evidence and their associated air quality levels (see Figures 1–4), 99th percentile 1-hour standard levels at and below 75 ppb should be considered to limit SO_2 concentrations such that the upper end of the distribution of daily maximum hourly concentrations would likely be below that observed in most of the U.S. studies. Judgments about the weight to place on uncertainties inherent in such studies should also inform selection of a specific standard level.
- Based on the air quality and exposure results, 1-hour standard levels in the range of 50–100 ppb should be considered to substantially limit 5-minute SO_2 concentrations ≥ 400 ppb and appreciably limit 5-minute SO_2 concentrations ≥ 200 ppb.
- Based on the air quality and exposure results, compared to a 1-hour standard in the range of 50–100 ppb, a 1-hour standard level at 150 ppb would be expected similarly limit 5-minute SO_2 concentrations ≥ 400 ppb, but would limit 5-minute SO_2 concentrations ≥ 200 ppb considerably less.
- If relatively more weight is placed on certain types of uncertainties in the epidemiologic and controlled human exposure evidence, levels up to 150 ppb could be considered, recognizing the questions as to the adequacy of protection that would be raised by levels at the higher end of this range.
- Placing relatively more weight on the consideration that participants in controlled human exposure studies do not include the most severe asthmatics would add support to considering standard levels down to 50 ppb.

d. CASAC views

CASAC expressed their views on potential levels for a standard in a letter to the EPA Administrator (Samet, 2009) within the context of their review of the 2nd draft REA, which also contained the draft policy assessment chapter. In drawing conclusions regarding the level of a short-term standard, CASAC considered the scientific evidence

evaluated in the ISA, the air quality, exposure, and risk results presented in the 2nd draft REA, and the evidence- and risk-based considerations presented in the policy assessment chapter of the 2nd draft REA. CASAC concurred with the conclusion from the policy assessment chapter for a range of standard levels beginning at 50 ppb: ''[that chapter 10] clearly provides sufficient rationale for the range of levels beginning at a lower limit of 50 ppb'' (Samet 2009, p. 16). For instance, CASAC has previously indicated that EPA should consider in its analyses the uncertainty that asthmatics participating in controlled human exposure studies do not represent the most SO_2 sensitive asthmatics (Henderson 2008 p. 6). With respect to the upper end of the range, CASAC stated, ''an upper limit of 150 ppb posited in Chapter 10 could be justified under some interpretations of weight of evidence, uncertainties, and policy choices regarding margin of safety,'' (Samet 2009, p. 16) although the letter did not provide any indication of what interpretations, uncertainties, or policy choices might support selection of a level as high as 150 ppb. Further, CASAC stated that ''the draft REA appropriately implies that levels greater than 150 ppb are not adequately supported'' (id). Moreover, CASAC stated that: ''the panel agrees that the posited range of 50 to 150 ppb and the exposition of factors to consider when comparing values within the range are appropriately conveyed (Samet 2009, p. 16).''

e. Administrator's conclusions on level for a 1-hour standard

As discussed above, in sections II.F.2 and II.F.3, the Administrator has proposed setting a 1-hour standard with a 99th percentile form. For the reasons discussed below, the Administrator proposes to set a level for a new 99th percentile 1-hour daily maximum primary SO_2 standard within the range from 50 to 100 ppb. In reaching this proposed decision, the Administrator has considered: (1) The evidence-based considerations from the final ISA and the final REA; (2) the results of the air quality, exposure, and risk assessments discussed above and in the final REA; (3) CASAC advice and recommendations on both the ISA and REA discussed above and provided in CASAC's letters to the Administrator; and (4) public comments received on the first and second drafts of the ISA and REA. In considering what level of a 1-hour SO_2 standard is requisite to protect public health with an adequate margin of safety, the Administrator is mindful that this choice requires judgments based on an interpretation of the evidence and other information that neither overstates nor understates the strength and limitations of that evidence and information.

The Administrator notes that the most direct evidence of respiratory effects from exposure to SO_2 comes from the controlled human exposure studies. These studies exposed groups of exercising asthmatics to defined concentrations of SO_2 for 5–10 minutes and found adverse respiratory effects. As discussed above, SO_2 exposure levels which resulted in respiratory effects in controlled human exposure studies were used in the REA as 5-minute benchmark exposures of potential concern. With respect to these 5-minute benchmarks, the Administrator focused on exceedences of the 400 and 200 ppb benchmarks. She notes that under ATS guidelines (ATS 1985, 2000) exposure to 5–10 minute SO_2 concentrations ≥ 400 ppb results in health effects which are clearly adverse: moderate or greater decrements in lung function (in terms of FEV_1 or sRaw [29]) that are frequently accompanied by respiratory symptoms.[30]

The Administrator also focused on exceedences of the 200 ppb benchmark, the lowest SO_2 concentration tested in free-breathing chamber studies. In these studies, moderate or greater decrements in lung function occurred in approximately 5 to 30% of exercising asthmatics, depending on the study. The Administrator further notes that while concentrations as low as 200 ppb have not been frequently accompanied by respiratory symptoms, she considers these effects to be adverse in light of CASAC advice and ATS guidelines. The REA concluded that these controlled human exposure studies could reasonably be interpreted to indicate an SO_2-induced shift in lung function for this population of asthmatics (REA, section 4.3), such that asthmatics would have diminished reserve lung function and would be at greater risk if affected by another respiratory agent (*e.g.,* viral infection). Importantly, diminished reserve lung function in a population that is attributable to air pollution is an adverse effect under ATS guidelines as discussed in section II.B.1.c.

As discussed below, the Administrator also considered the results of the air quality, exposure, and risk analyses, as they serve to estimate the extent to which a given 1-hour standard limits peaks of SO_2 above the 5-minute benchmark concentrations derived from controlled human exposure studies. In considering these results as they relate to limiting 5-minute SO_2 concentrations ≥ 400 ppb and ≥ 200 ppb, and being mindful that more severe effects occur following 5-minute SO_2 exposures ≥ 400 ppb, the Administrator finds the most support for 99th percentile 1-hour daily maximum standard levels up to 100 ppb to protect against 5-minute SO_2 exposures ≥ 200 ppb. She notes that the 40-county air quality analysis estimates that a 100 ppb 1-hour standard would allow at most 2 days per year on average when estimated 5-minute daily maximum SO_2 concentrations exceed the 400 ppb benchmark, and at most 13 days per year on average when 5-minute SO_2 concentrations exceed the 200 ppb benchmark (Table 2). Furthermore, given a simulated 1-hour 100 ppb standard level, most counties in the air quality analysis were estimated to experience 0 days per year on average when 5-minute SO_2 concentrations exceed the 400 ppb benchmark and ≤ 3 days per year on average when 5-minute SO_2 concentrations were estimated to exceed the 200 ppb benchmark (see REA, Tables 7–14 and 7–12).

In addition, the St. Louis exposure analysis estimates that a 99th percentile 1-hour standard at a level of 100 ppb would likely protect > 99% of asthmatic children at moderate or greater exertion from experiencing at least one 5-minute exposure ≥ 400 ppb per year, and approximately 97% of asthmatic children at moderate or greater exertion from experiencing at least one exposure ≥ 200 ppb per year. In contrast, the Administrator notes that the St. Louis exposure analysis estimates a 99th percentile 1-hour daily maximum standard at a level of 150 ppb would likely protect only about 88% of asthmatic children at moderate or greater exertion from experiencing at least one 5-minute exposure ≥ 200 ppb per year. Finally, the Administrator notes that the St. Louis risk assessment estimates that a 99th percentile 1-hour standard level at 100 ppb would likely protect about 97–98% of exposed asthmatic children from experiencing at least one moderate or greater lung function response (defined as a ≥ 100% increase in sRaw). Based on these

[29] Decreases of 10–20% in FEV_1 (forced expiratory volume) and/or 100–200% increases in sRaw (specific airway resistance) are defined as moderate decrements in lung function.

[30] The ISA concluded that collective evidence from controlled human exposure studies considered in the previous review, along with a limited number of new controlled human exposure studies, consistently indicates that with elevated ventilation rates a large percentage of asthmatic individuals tested in a given chamber study (up to 60%, depending on the study) experience moderate or greater decrements in lung function, frequently accompanied by respiratory symptoms, following peak exposures to SO_2 at concentrations of 0.4–0.6 ppm. (ISA, p 3–9).

considerations, she concludes that there is support for a 99th percentile 1-hour daily maximum standard level at or below 100 ppb to appreciably limit 5-minute exposures to SO_2 above the 200 ppb benchmark level.

Turning to the epidemiologic evidence, the Administrator notes that epidemiologic studies have reported associations between more serious health outcomes (*i.e.* respiratory-related ED visits and hospitalizations) and ambient SO_2 concentrations. Unlike the controlled human exposure studies however, results from epidemiologic studies can be complicated by the fact that SO_2 is but one component of a complex mixture of pollutants in the ambient air. This uncertainty is addressed by the ISA which concluded that the limited available evidence indicates that the effect of SO_2 on respiratory health outcomes appears to be generally robust and independent of the effects of gaseous co-pollutants, including NO_2 and O_3, as well as particulate co-pollutants, particularly $PM_{2.5}$ (ISA, section 5.2; p. 5–9).

The Administrator also notes that in general, associations reported in epidemiologic analyses are not associated with a defined exposure level of a pollutant (unlike the controlled human exposure studies), but represent concentrations of a pollutant taken from ambient monitoring data during the study period. These concentrations are used as surrogates for the distribution of pollutant exposures across the study area over the time period of the study. This introduces a degree of uncertainty in the interpretation of epidemiologic results in that it can be difficult to discern what part of the distribution of pollutant levels are likely most linked to the associations reported in epidemiologic analyses.

With respect to SO_2 specifically, the Administrator notes that adverse respiratory effects in epidemiologic studies are especially likely to occur at the upper end of the distribution of ambient SO_2 concentrations. Although some epidemiologic studies reported a linear relationship across the entire range of SO_2 concentrations, a few other studies found that the increase in SO_2-related respiratory health effects was observed at the upper end of the distribution of SO_2 concentrations (ISA, section 5.3, p. 5–9). For example, an epidemiologic study conducted in Bronx, NY suggested an increased risk of asthma hospitalizations on the days with the highest SO_2 concentrations (Lin *et al.,* 2004). More specifically, these authors observed increased risk of asthma hospitalizations at SO_2 concentrations somewhere between the 90th and 95th percentiles (ISA, section 4.1.2 and ISA, Figure 4–4).

This epidemiologic evidence, though not independently sufficient to draw conclusions regarding causation, is consistent with, and informed by, the large body of controlled human exposure studies of exercising asthmatics exposed to short-term peak concentrations of SO_2; these controlled human exposure studies provide the ''definitive evidence'' that short-term peak SO_2 exposure is associated with respiratory morbidity (ISA, Section 5.3, page 5–8). These studies consistently found moderate or greater decrements in lung function (*i.e.* $\geq$ 100% increase in sRaw and/or $\geq$ 15% decline in FEV_1) and/or respiratory symptoms in exercising asthmatics following 5–10 minute peak exposures to SO_2. Discussing the possible relationship between effects observed in these controlled human exposure studies and the associations reported in the epidemiologic studies, the ISA stated: ''it is possible that these associations [in the epidemiologic studies] are determined in large part by peak exposures within a 24-hour period'' (ISA, section 5.2 at p. 5–5). Similarly, the ISA stated that: ''the effects of SO_2 on respiratory symptoms, lung function, and airway inflammation observed in the human clinical studies using peak exposures further provides a basis for a progression of respiratory morbidity resulting in increased ED visits and hospital admissions'' and makes the associations observed in the epidemiologic studies ''biologica[lly] plausib[le]'' (ISA, section 5.2 at p. 5–5). Thus, considered together, the epidemiologic and controlled human exposure evidence suggest that it is a reasonable approach to move the air quality distribution lower in a manner that targets control of both hourly and 5–10 minute peak SO_2 exposures.

For the reasons discussed above in section II.F.3, the Administrator has proposed a 99th percentile of the 1-hour daily maximum concentration as an appropriate form.[31] Moreover, as just discussed, there is support for the Agency's view that adverse respiratory effects in epidemiologic studies are especially likely to occur at the upper end of the distribution of ambient SO_2 concentrations. Therefore, the Administrator finds it reasonable to focus on limiting the 99th percentile SO_2 levels reported in locations where positive associations were found in key epidemiologic studies. Adjusting the distribution of SO_2 levels in this manner will target control of those hourly and 5–10 minute peak SO_2 concentrations that are of most concern.

In considering the epidemiologic evidence with regard to level, the Administrator notes that there have been more than 50 peer reviewed epidemiologic studies evaluating SO_2 published worldwide (ISA, Tables 5–4 and 5–5). The Administrator finds that in assessing the extent to which these studies and their associated air quality information can inform the level of a new 99th percentile 1-hour daily maximum standard, U.S. and Canadian air quality information is most relevant. As described in section II.F.4.a, SO_2 concentrations reported for Canadian studies are not directly comparable to those reported for U.S. studies. That is, concentrations reported for Canadian analyses represent the average 99th percentile 1-hour daily maximum level across multiple monitors in a given city (REA Figure 5–5), rather than the concentration from the single monitor that recorded the highest SO_2 level (see Thompson and Stewart, 2009). Thus, the Administrator focused on 99th percentile air quality information from U.S. studies for informing potential 1-hour standard levels.

The Administrator notes that Figures 1 to 4 include 99th percentile 1-hour daily maximum SO_2 concentrations from ten U.S. epidemiologic studies of ED visits and hospital admissions (Figures 5–1 to 5–4 in the REA). The Administrator agrees with the REA finding that this information provides evidence of associations between ambient SO_2 and ED visits and hospital admissions in cities with particular 99th percentile 1-hour SO_2 levels. This information is relevant for identifying standard levels that could significantly limit SO_2 concentrations so that the upper end of the distribution of daily maximum hourly concentrations would likely be below that observed in most of these studies. These figures report mostly positive, and sometimes statistically significant, associations between ambient SO_2 concentrations and ED visit and hospital admissions in locations where 99th percentile 1-hour daily maximum SO_2 levels ranged from 50–460 ppb. Moreover, within this broader range of SO_2 concentrations, seven of these studies were in locations where the 99th percentile of the 1-hour daily maximum SO_2 concentrations were in the range of 75–150 ppb. The Administrator particularly notes the

[31] As previously discussed in section II.F.3, a 99th percentile form was proposed to: (1) Minimize the number of days per year that an area could exceed the level of the standard and still attain the standard; (2) limit the prevalence of 5-minute peaks of SO_2; and (3) provide a stable regulatory target to prevent areas from frequently shifting in and out of attainment.

cluster of three epidemiologic studies between 78–150 ppb (for the 99th percentile of the 1-hour SO_2 concentrations) where the SO_2 effect estimate remained positive and statistically significant in multi-pollutant models with PM (NYDOH (2006), Ito *et al.,* (2007), and Schwartz *et al.,* (1995)). The Administrator also notes the limited evidence from two epidemiologic studies employing single pollutant models that found mostly positive, and sometimes statistically significant, associations between ambient SO_2 and ED visits in locations where 1-hour SO_2 concentrations were approximately 50 ppb (Figures 1 and 2). Based on the interpretation of the epidemiologic evidence discussed above, the Administrator concludes that this evidence provides support for consideration of a 99th percentile 1-hour daily maximum standard level at or below 75 ppb to limit SO_2 concentrations such that the upper end of the distribution of daily maximum hourly concentrations would likely be below that observed in most of the U.S. studies. The Administrator also recognizes that judgments about the weight to place on uncertainties inherent in such studies should inform selection of a specific standard level.

Based on the epidemiologic and controlled human exposure information presented above, the Administrator considered what range of standard levels would be requisite to protect public health, including the health of at-risk groups, with an adequate margin of safety that is sufficient but not more than necessary to achieve that result. The assessment of a standard level calls for consideration of both the degree of risk to public health at alternative levels of the standard as well as the certainty that such risk will occur at any specific level. Based on the information available in the ISA, there is no evidence-based bright line that indicates a single appropriate level. Moreover, given that a 1-hour averaging time is being used to control 5-minute peaks of SO_2, the Administrator also recognizes that the results of the air quality, exposure, and risk analyses will have to be considered given that these analyses indicate the extent to which a particular 99th percentile 1-hour daily maximum standard will likely limit 5-minute SO_2 peaks of a given concentration. Thus, the combination of scientific evidence and air quality, exposure, and risk-based information needs to be considered as a whole in making this public health policy judgment.

In selecting a level that would serve as an appropriate upper end for a range of levels to propose, the Administrator has considered a cautious approach to interpreting the available evidence and exposure/risk-based information—that is, an approach that places relatively more weight on those types of uncertainties and limitations in the information that would lead to placing less reliance on the results of the epidemiologic studies. This approach would tend to avoid potentially overestimating public health risks and the degree of protection likely to be associated with just meeting a particular standard level. This approach would place more weight in particular on uncertainties in epidemiologic evidence such as concerns related to exposure measurement error, the possible role of co-pollutants and effects modifiers, and interindividual differences in susceptibility to SO_2-related effects.

In applying this approach, the Administrator has selected an upper end of a range of levels to propose at 100 ppb. The selection of this level focuses on the results of the controlled human exposure studies and is primarily based on the results of the air quality and exposure analyses which suggest that a 1-hour standard should be at or below 100 ppb to appreciably limit 5-minute SO_2 benchmark concentrations ≥ 200 ppb. That is, as mentioned above, the St. Louis exposure analysis indicates that a 1-hour standard at 100 ppb would still be estimated to protect about 97% of asthmatic children at moderate or greater exertion from experiencing at least one 5-minute SO_2 exposure ≥ 200 ppb. In contrast, the St. Louis exposure analysis estimates that a 1-hour standard at 150 ppb would likely only protect about 88% of asthmatic children at moderate or greater exertion from experiencing at least one 5-minute SO_2 exposure ≥ 200 ppb.

In selecting a level that would serve as an appropriate lower end for a range of levels to propose, the Administrator has considered a precautionary approach to interpreting the available evidence and exposure/risk-based information—that is, an approach that places relatively more weight on the results of the epidemiological studies, as well as more weight on those types of uncertainties that may be associated with potentially underestimating health effects in the most sensitive populations. This approach would tend to avoid potentially underestimating public health risks and the degree of protection likely to be associated with just meeting a particular standard level. This approach would place more weight on the consideration that the participants in controlled human exposure studies did not include individuals with severe asthma.

In applying this approach, she has selected 50 ppb as the lower end of a range of levels to propose, which is consistent with CASAC's advice. The selection of this level focuses in part on the epidemiologic evidence. With respect to the epidemiologic studies, seven of ten U.S. ED visit and hospital admission studies reporting generally positive associations with ambient SO_2 were conducted in locations where 99th percentile 1-hour daily maximum SO_2 levels were about 75–150 ppb, and three of these studies observed statistically significant positive associations between ambient SO_2 and respiratory-related ED visits and hospitalizations in multi-pollutant models with PM (NYDOH (2006), Ito *et al.,* (2007), and Schwartz *et al.,* (1995)). Further, the Administrator notes that a 99th percentile 1-hour daily maximum standard set at a level of 50 ppb is well below the 99th percentile 1-hour daily maximum SO_2 concentrations reported in locations where these studies were conducted (*i.e.* well below 99th percentile 1-hour daily maximum SO_2 levels of 78–150 ppb). Finally, the Administrator notes that two epidemiologic studies reported generally positive associations between ambient SO_2 and ED visits in cities when 99th percentile 1-hour daily maximum SO_2 concentrations were approximately 50 ppb, but does not consider that evidence strong enough to set a lower standard level.

In considering the results of the air quality and exposure analyses, the Administrator also notes that the 40-county air quality analysis estimates that a 99th percentile 1-hour daily maximum standard set at a level of 50 ppb would result in zero days per year when estimated 5-minute SO_2 concentrations exceed the 400 ppb 5-minute benchmark level and at most 2 days per year when modeled 5-minute SO_2 concentrations exceed the 200 ppb 5-minute benchmark level. In addition, the St. Louis exposure analysis estimates that a 99th percentile 1-hour daily maximum standard set at a level of 50 ppb would likely protect > 99% of asthmatic children at moderate or greater exertion from experiencing at least one 5-minute exposure both ≥ 400 and ≥ 200 ppb per year.

The Administrator thus proposes to set the level of a new 1-hour standard that would protect public health with an adequate margin of safety between 50 ppb and 100 ppb. In so doing, the Administrator is relying on reported findings from both epidemiologic and controlled human exposure studies, as well as the results of air quality and exposure analyses. The Administrator

solicits comment on this proposed range of standard levels as well as on the approach she has used to identify the range. Specifically, the Administrator solicits comment on the following:

- The weight she has placed on the epidemiologic evidence, the controlled human exposure evidence, and the air quality, exposure, and risk information, the benchmark used to select the proposed range, and the uncertainties associated with each of these.
- The most appropriate level within this proposed range given the available scientific evidence, and air quality, exposure, and risk information, and the uncertainties associated with each.

With regard to the proposed range of standard levels, the Administrator notes that the lower end of the proposed range is consistent with CASAC advice that there is clearly sufficient evidence for consideration of standard levels starting at 50 ppb (Samet 2009). With respect to the upper end of the proposed range, the Administrator notes that CASAC concluded that standards up to 150 ppb ''could be justified under some interpretations of weight of evidence, uncertainties, and policy choices regarding margin of safety'' (Samet 2009, p. 16), although the letter did not provide any indication of what interpretations, uncertainties, or policy choices might support selection of a level as high as 150 ppb.

In light of the range of levels included in CASAC's advice, the Administrator solicits comment on setting a standard level above 100 ppb and up to 150 ppb. In so doing, the Administrator again recognizes that there are uncertainties with the scientific evidence, such as attributing effects reported in epidemiologic studies specifically to SO_2 given the presence of co-occurring pollutants, especially PM, and the uncertainties associated with using ambient SO_2 concentrations as a surrogate for exposure. Any comments should specifically address the cluster of epidemiologic studies that remained statistically significant in co-pollutant models with PM, two of which had 99th percentile levels appreciably lower than 150 ppb. Commenters should also address the conclusion in the ISA that the respiratory effects seen in the epidemiologic studies are generally robust and independent of co-pollutants. In addition, the Administrator notes that compared to the proposed range of 50–100 ppb, a standard level as high as 150 ppb would not comparably limit 5-minute SO_2 exposures ≥ 200 ppb. She notes that the St. Louis exposure analysis estimates that a 150 ppb standard would protect approximately 88% of asthmatic children at moderate or greater exertion from experiencing at least one SO_2 exposure ≥ 200 ppb per year (compared to > 99% and approximately 97% given standards at 50 and 100 ppb respectively; see Table 3). There are also questions as to whether a standard set at this level would provide an adequate margin of safety. Thus, with respect to considering whether it would be appropriate to set a standard level as high as 150 ppb, the Administrator invites comment on the extent to which it is appropriate to emphasize uncertainties with respect to the epidemiologic evidence. She also invites comment on the implications such considerations would have on limiting 5-minute SO_2 exposures ≥ 200 ppb.

5. Implications for retaining or revoking current standards

The REA recognized that the particular level selected for a new 1-hour daily maximum standard would have implications for reaching decisions on whether to retain or revoke the current 24-hour and annual standards. That is, with respect to SO_2-induced respiratory morbidity, the lower the level selected for a 99th percentile 1-hour daily maximum standard, the less additional public health protection the current standards would be expected to provide. As previously mentioned (see section II.E.3), CASAC expressed a similar view following their review of the 2nd draft REA: ''assuming that EPA adopts a one hour standard in the range suggested, and if there is evidence showing that the short-term standard provides equivalent protection of public health in the long-term as the annual standard, the panel is supportive of the REA discussion of discontinuing the annual standard'' (Samet 2009, p. 15). With regard to the current 24-hour standard, CASAC was generally supportive of using the air quality analyses in the REA as a means of determining whether the current 24-hour standard was needed in addition to a new 1-hour standard to protect public health. CASAC stated: ''the evidence presented [in REA Table 10–3] was convincing that some of the alternative one-hour standards could also adequately protect against exceedances of the current 24-hour standard'' (Samet 2009, p. 15).

In accordance with the REA findings and CASAC recommendations mentioned above, the Administrator notes that the 1-hour standards being proposed (*i.e.,* 99th percentile 1-hour daily maximum SO_2 standards at 50–100 ppb) would have the effect of maintaining 24-hour and annual SO_2 concentrations generally well below the levels of the current 24-hour and annual NAAQS (see REA Tables 10–3 and 10–4 and REA Appendix Tables D–3 to D–6). Thus, if a new 99th percentile 1-hour daily maximum standard is set in the proposed range of 50–100 ppb, than the Administrator proposes to revoke the current 24-hour and annual standards. However, if a standard is set at a level >100 ppb and up to 150 ppb, then the Administrator proposes to retain the existing 24-hour standard, recognizing that a 99th percentile 1-hour daily maximum standard at 150 ppb would not have the effect of maintaining 24-hour average SO_2 concentrations below the level of the current 24-hour standard in all locations analyzed (see REA Appendix Table D–4). However, the Administrator would revoke the current annual standard recognizing: (1) 99th percentile 1-hour daily maximum standards in the range of 50–150 ppb would maintain annual average SO_2 concentrations below the level of the current annual standard (see REA Table 10–4 and REA Appendix tables D–5 and D–6); and (2) the lack of sufficient evidence linking long-term SO_2 exposure to adverse health effects.

G. Summary of proposed decisions on the primary standard

For the reasons discussed above, and taking into account information and assessments presented in the ISA and REA as well as the advice and recommendations of CASAC, the Administrator proposes that the current 24-hour and annual standards are not requisite to protect public health with an adequate margin of safety. The Administrator proposes to establish a new 1-hour standard that will afford increased protection for asthmatics and other at-risk populations against an array of adverse respiratory health effects related to short-term (5-minutes to 24-hours) SO_2 exposure. These effects include increased decrements in lung function (defined in terms of sRaw and FEV_1), increases in respiratory symptoms, and related serious indicators of respiratory morbidity including emergency department visits and hospital admissions for respiratory causes.

Specifically, the Administrator proposes to set a new short-term primary SO_2 standard with a 1-hour (daily maximum) averaging time and a form defined as the 3-year average of the 99th percentile or the 4th highest daily maximum concentration. The level for the new standard is proposed to be within the range of 50–100 ppb. The Administrator also solicits comment on levels as high as 150 ppb. In addition to

setting a new 1-hour standard in the proposed rage of 50–100 ppb, the Administrator proposes to revoke the current 24-hour and annual standards recognizing that a 1-hour standard set in the proposed range of 50–100 ppb will have the effect of generally maintaining 24-hour and annual SO_2 concentrations well below the levels of the current 24-hour and annual standards. Moreover, the Administrator notes that there is little health evidence to support an annual standard for the purpose of protecting against health effects associated with long-term SO_2 exposures.

III. Proposed Amendments to Ambient Monitoring and Reporting Requirements

EPA is proposing changes to the ambient air monitoring, reporting, and network design requirements for the SO_2 NAAQS. This section discusses the changes we are proposing that are intended to support the proposed 1-hour NAAQS, and the possible retention of the existing 24-hour NAAQS depending on the selected level of the 1-hour NAAQS, as described in Section II above. Ambient SO_2 monitoring data are used to determine whether an area is in violation of the SO_2 NAAQS. Ambient SO_2 monitoring data are collected by state, local, and tribal monitoring agencies (''monitoring agencies'') in accordance with the monitoring requirements contained in 40 CFR parts 50, 53, and 58.

A. Monitoring methods

To be used in a determination of compliance with the SO_2 NAAQS, SO_2 data must be collected using either a Federal Reference Method (FRM) or a Federal Equivalent Method (FEM) as defined in 40 CFR Parts 50 and 53. The current monitoring methods in use by most State and local monitoring agencies are FEM analyzers based on the ultraviolet fluorescence (UVF) measurement principle. These continuous analyzers were implemented into the SO_2 monitoring networks in the early 1980s, and the current manual FRM for SO_2 is no longer used for field monitoring. The current list of all approved FRMs and FEMs capable of providing ambient SO_2 data for use in attainment designations may be found on the EPA Web site *http://www.epa.gov/ttn/amtic/files/ambient/criteria/reference-equivalent-methods-list.pdf.*

For reasons explained subsequently, EPA proposes to establish a new FRM for measuring SO_2 in the ambient air. This proposed new FRM for SO_2 would be an automated method based on UVF (the same type of analyzers now in widespread use), and it would be specified in the form of a reference measurement principle and a calibration procedure. It would be in a new Appendix A–1 to 40 CFR Part 50. Analyzers approved as FRMs for SO_2 after the effective date of the final rule would be subject to performance specifications and other requirements set forth in 40 CFR Part 53, under associated amendments proposed for Part 53. The existing FRM for SO_2 (a wet-chemical, manual method) would be retained for some period of time, thereby permitting continued use of currently designated FEMs to avoid any disruption to existing SO_2 monitoring networks.

1. Background

FRMs, as set forth in several appendices to 40 CFR Part 50, serve either or both of two primary purposes. The first is to provide a specified, definitive methodology for routinely measuring concentrations of various ambient air pollutants for comparison to the NAAQS in Part 50 and for other air monitoring objectives. The second is to provide a standard of comparison for determining equivalence to the specified reference method of alternative and perhaps more practical pollutant measurement methods (FEMs) that can be used in lieu of the FRM for routine monitoring.

Some of the FRMs contained in appendices to Part 50 (such as the current SO_2 FRM) are manual methods that are completely specified within their respective appendices. Others (such as the ozone FRM) are in the form of a measurement principle and associated calibration procedure that must be implemented in a commercial FRM analyzer model. Such FRM analyzers must be tested and shown to meet explicit performance and other requirements that are set forth in 40 CFR Part 53 (Ambient Air Monitoring Reference and Equivalent Methods). Each of these analyzer models is considered to be an FRM only upon specific designation as such by EPA under the provisions of Part 53.

From time to time, as pollutant measurement technology advances, the reference methods in these Part 50 appendices need to be assessed to determine if improved or more suitable measurement technology has become available to better meet current FRM needs as well as potential future FRM requirements. Such new technology can either be presented to EPA for evaluation by an FEM applicant under § 53.16, or (as in this case) EPA can originate the process itself as provided in § 53.7. If, after reviewing a new methodology, the Administrator determines that the new methodology is substantially superior, § 53.16 of Part 53 provides for supersession of FRMs under these circumstances.

The FRM for measuring SO_2 in the ambient air was promulgated on April 30, 1971 (36 FR 8186), in conjunction with EPA's establishment (originally as 42 CFR Part 410) of the first national ambient air quality standards (NAAQS) for six pollutants (including sulfur dioxide) as now set forth in 40 CFR Part 50. This SO_2 FRM is specified in Appendix A of Part 50 and identified as the pararosaniline method. It is a manual, wet-chemical method requiring sample air to be bubbled through an absorbing reagent (tetrachloromecurate), which is then returned to a laboratory for chemical analysis. At the time of its promulgation, the method was considered the best available method and was in considerable use for monitoring SO_2 in the air. However, newly developed automated continuous analyzers approved as FEMs rapidly supplanted use of this manual method for air monitoring in the U.S. By the 1990's, the FRM was no longer used at all in domestic air monitoring (EPA, 2009b), and since then the method has been used mainly as a comparison reference method for the testing and designation of candidate FEMs for SO_2 in accordance with 40 CFR Part 53.

The pararosaniline manual FRM has served its role for many years, but now a better method is needed that more fully meets the needs of contemporary SO_2 monitoring. The existing FRM is primarily a 24-hour integrated method, whereas a 1-hour SO_2 FRM measurement capability would be needed to implement the proposed 1-hour SO_2 NAAQS. Existing FEM analyzers can and do provide 1-hour measurement capability, but EPA wishes to facilitate the approval of new monitoring technologies as well. While the existing manual reference method can produce 1-hour averages, it is clearly impractical for routine use in making 1-hour SO_2 measurements. Also, the 1-hour mode of the manual method is not a good standard for approving new FEMs with 1-hour measurement capability, because scores of 1-hour measurements would be needed during equivalency testing. Further, the existing FRM is cumbersome to use and requires a mercury-containing reagent that is potentially hazardous to operators or to the environment if it is mishandled.

These operational shortcomings suggest that the existing FRM should be replaced with a more suitable

methodology. Fortunately, the existing SO_2 instrumental measurement technique based on the UVF measurement principle offers superior performance and substantial operational advantages, as reported in an FRM evaluation for EPA produced by Research Triangle Institute (Rickman, 1987). Analyzers using this technique can well provide the needed detection limits, precision, and accuracy and fulfill other purposes of an FRM, including use as an appropriate standard of reference for testing and designation of new FEM analyzers. After reviewing these factors, EPA has determined that a new, automated FRM for SO_2 based on the UVF measurement principle should be adopted. EPA is proposing to add the new FRM in a new Appendix A–1 to Part 50.

In association with the proposed new FRM, EPA is also proposing to update the performance-based requirements for FEM SO_2 analyzers currently in 40 CFR Part 53. These requirements were established in the 1970's, based primarily on the wet-chemical measurement technology available at that time. Those initial requirements have become significantly outdated and should be modified to match current technology, particularly because they would apply to new FRM analyzers under the proposed new FRM. The better instrumental performance available with the proposed new UVF reference method technique allows the performance requirements for SO_2 in 40 CFR Part 53 to be made more stringent for both FRM and FEM analyzers (EPA, 2009c).

2. Proposed new FRM measurement technique

Since the 1970's, a variety of measurement principles have been successfully used to produce continuous analyzers for SO_2, some of which have qualified for EPA designation as equivalent methods (found at *http://www.epa.gov/ttn/amtic/files/ambient/criteria/reference-equivalent-methods-list.pdf*). These include methods based on ultraviolet fluorescence, flame photometry, differential optical absorption spectroscopy, coulometric and conductometric techniques, and second derivative ultraviolet absorption spectrometry. Although some of these techniques saw considerable utilization in the 1970's, their use dwindled after the introduction of UVF analyzers because of various shortcomings such as non-specificity for SO_2, susceptibility to interferences, marginal performance, or operational disadvantages (*e.g.* requiring hydrogen gas or wet-chemical reagents). Consequently, the UVF technique has emerged as the clearly dominant measurement technique for SO_2, providing a majority of the domestic air monitoring data obtained over the last three decades, and virtually 100% of the current monitoring data (EPA, 2009b). As the proposed new reference method, the UVF technique would be specified in performance-based form, with a generic reference measurement principle and associated calibration procedure in a new Appendix A–1 to 40 CFR Part 50. Associated performance requirements applicable to candidate UVF FRM analyzers would be specified in 40 CFR Part 53. This form of the FRM is consistent with that specified for FRMs for CO, O_3, and NO_2 in Appendices C, D, and F (respectively) to 40 CFR Part 50.

Reasonable commercial availability of high quality analyzers utilizing the reference measurement principle that can be offered by multiple manufacturers, ideally over many years, is an important aspect of any new reference measurement principle. EPA has designated more than a dozen UVF analyzers as equivalent to the current reference method over the last 30 years. Although most of the early model UVF analyzers are no longer in production, many have been replaced by redesigned and improved models, and entirely new models continue to become designated as FEMs. Currently, more than a half-dozen designated FEM models offered by multiple manufacturers are commercially available. The widespread use of the method has three important technical advantages for an FRM: (1) A variety of analyzer models are available and will likely continue to be available from multiple manufacturers for many years to come, (2) analyzer manufacturers have had (and continue to have) a strong marketing incentive to improve, refine, perfect, and continue to market such analyzers, and (3) the number of accumulated UVF field monitoring datasets (including related QC data) provide an extensive, available performance track record that can be evaluated to assess the performance of the analyzers in actual monitoring use.

The only other equivalent method measurement technique that has even a small representation among currently available FEM analyzers is the differential optical absorption spectrometric method. The open-path nature of this method (measurement of pollutants in the open air without a closed measurement cell) is not suitable for many of the purposes of a reference method. Further, this method is only available as two product models from two manufacturers, and very few State and local monitoring agencies are using such analyzers.

The UVF technique is not without some imperfections as a reference method. Analyzers utilizing the technique are, to a limited degree, susceptible to interference from aromatic hydrocarbon species and potentially other compounds at existing levels or levels that may occur at many monitoring sites. However, analyzer manufacturers have developed very effective ways to reduce these potential limitations, including careful selection of wavelengths, optimum optical design, and sample air scrubbers, such that typical interferences are minimal.

All UVF analyzers that have been designated as SO_2 FEMs have been tested and shown to meet the existing performance requirements of 40 CFR Part 53. These include required testing for both positive and negative potential interferents, minimum level of measurement, zero and span drift, and precision. The results of these tests have been submitted to EPA and are in the archived FEM applications for these analyzers. Many newer models substantially exceed those requirements, with sensitivities down to less than 1 ppb, and typically commensurate levels of signal noise, precision, and zero drift (EPA, 2009c). In addition, UVF analyzers can accommodate a wide range of concentration measurement ranges. They are quite well suited to measure high, short-term SO_2 concentrations near sources, and they can also be used to measure trace-level concentrations in clean areas.

For these reasons, EPA has decided to propose a new automated SO_2 FRM based on the UVF measurement technology. EPA is confident that commercially available UVF instrument models would provide capability to serve not only current monitoring and FRM applications but anticipated monitoring and FRM needs well into future years. EPA solicits comment on the proposal to promulgate an FRM for SO_2 that would be an automated method based on ultraviolet fluorescence, which would be specified in the form of a reference measurement principle and calibration procedure, as stated here, and contained in a new Appendix A–1 to 40 CFR Part 50.

3. Technical description of the proposed UVF FRM

The proposed new reference method is based on automated measurement of the intensity of the characteristic fluorescence released by SO_2 in an ambient air sample when irradiated by ultraviolet light. The SO_2 fluorescence produced is also in the ultraviolet range,

but is measured at a longer wavelength. An analyzer implementing this measurement principle would include a measurement cell, an ultraviolet light source of appropriate wavelength, an ultraviolet detector system with appropriate wavelength sensitivity, and a pump and flow control system for sampling the ambient air. Generally, the analyzer also requires a means to reduce concentrations of aromatic hydrocarbons and possibly other compounds (depending on target wavelengths and other parameters used) in the air sample to control for potential measurement interferences. The analyzer is calibrated by referencing the instrumental fluorescence measurements to SO_2 standard concentrations traceable to a NIST (National Institute of Standards and Technology) primary standard for SO_2. This generic description of the FRM would be contained in Appendix A–1 to 40 CFR Part 50 and would be coupled with explicit analyzer performance requirements specified in Subpart B of 40 CFR Part 53. To qualify as an FRM, an analyzer model based on this principle would have to be tested in accordance with test procedures in Subpart B Part 53 and shown to meet the performance requirements specified in that Subpart. EPA could then designate the analyzer model as an FRM analyzer, as provided in Part 53.

4. Implications to air monitoring networks

Under § 53.16, EPA must consider the benefits of a proposed supersession of an existing reference method, the potential economic consequences of such action for State and local monitoring agencies, and any disruption of State and local air quality monitoring programs that might result from such action. Supersession of an existing reference method, as described in § 53.16, presumes that the existing FRM would be deleted from Part 50 and replaced with a new FRM, and that all equivalent methods based on the old FRM would be cancelled. In the case of SO_2, essentially all current domestic air monitoring activity is carried out using FEM UVF analyzers. Cancellation of the FEM designations of all these analyzers now would be potentially very disruptive to State, local, and other monitoring networks, even though § 53.16 alludes to a possible transition period to allow monitoring agencies some period of time to replace cancelled FEM analyzers.

EPA recognizes that these existing SO_2 FEMs are providing monitoring data that are adequate for the current and the proposed SO_2 NAAQS and for many other purposes, and there appears to be no need or purpose served by their withdrawal. Therefore, in this case, EPA proposes instead to retain the existing manual FRM for SO_2 and to promulgate an entirely new automated FRM for SO_2. The new FRM description would be contained in a new Appendix A–1 to 40 CFR Part 50, and the existing FRM would be re-codified as Appendix A–2 to 40 CFR Part 50, with both reference methods coexisting. Following adoption of the new Appendix A–1, new language proposed for § 53.2(a) and (b) would provide that new FRM and FEM analyzers for SO_2 be designated only with reference to the proposed new Appendix A–1. At the same time, retention of the existing SO_2 reference method will preclude the need to cancel the designations of all existing FEMs for SO_2.

Under this proposal, no monitoring agencies would be required to change their SO_2 monitoring procedures as a result of the proposed changes, so it would have no economic costs for implementation and no disruptive effects on state, local, or tribal air quality monitoring programs. Further, since UVF FEM analyzers have been in dominant use for many years, no bias or discontinuity in any aspect of the monitoring data obtained subsequently would result from the proposed change in the SO_2 reference methodology.

In conjunction with the proposed new FRM, EPA is also proposing to adopt updated performance requirements in 40 CFR Part 53, applicable to both FRM and FEM analyzers, consistent with the automated methods and in anticipation of future NAAQS needs. This would ensure that, going forward, all new SO_2 monitors would have improved performance. EPA believes that the proposal to retain the existing FRM while adding the new FRM would provide for a smooth, evolutionary transition from the older, manual FRM to the new, modern, automated FRM and FEM technology and the associated better performance requirements, with no immediate impact to current monitoring activities. For purposes of comparing SO_2 monitoring data to the SO_2 NAAQS, the EPA believes that the UVF FEMs are appropriate for continued use under the current standards and under the option being considered for a new 1-hour averaged primary SO_2 NAAQS. After several years, at a time when either a new SO_2 NAAQS would require higher monitoring data quality or there would be no further potential for disruption to monitoring agencies, EPA would plan to withdraw the older reference method and it's associated FEMs.

5. Proposed revisions to 40 CFR Part 53

Several amendments associated with the proposed new SO_2 reference measurement principle are proposed to 40 CFR Part 53. The most significant of these would update the performance requirements for both new FRM and new FEM analyzers for SO_2, as set forth in proposed revised Table B–1. Based on typical performance capabilities available for UVF analyzers, EPA is proposing to reduce the allowable noise from 5 ppb to 1 ppb, the lower detectable limit from 10 ppb to 2 ppb, and the allowable interference equivalent limits from ±20 ppb to ±5 ppb for each interferent and from 60 ppb to 20 ppb for the total of all interferents. Also, EPA proposes to change the allowable zero drift limits from ±20 ppb to ±4 ppb, and to delete the specified limits for span drift at 20% of the upper range limit (URL) for SO_2 analyzers. Review of FEM analyzer performance test results has shown that the 20% URL span limit requirements are unnecessary because drift performance requirements are adequately covered by the zero drift and 80% URL span drift limits. EPA proposes to change the lag time allowed from 20 to 2 minutes and change the rise and fall time limits from 15 to 2 minutes. For precision, EPA proposes to change the form of the precision limit specifications from ppm to percent (of the URL) for SO_2 analyzers and to set the limit at 2 percent for both 20% and 80% of the URL. Two percent is equivalent to 10 ppb for the standard (500 ppb) range, which is equivalent to the existing limit value for precision at 20% of the URL, but would be a reduction from 15 ppb to 10 ppb for the limit value at 80% of the URL. This change in units from ppm (or ppb as given here) to percent makes the requirement responsive to higher and lower measurement ranges. Also, a new footnote is proposed to be added to Table B–1 to clarify how noise tests are to be carried out for candidate analyzers having an adjustable or automatic time constant capability.

EPA recognizes that SO_2 monitoring needs can vary widely, from monitoring background levels in pristine areas to measuring short-term (1-hour) or even very short-term (less than 1-hour) high-level averages in the vicinity of substantial sources of SO_2. To address the need for more sensitive, lower measurement ranges for SO_2 analyzers, EPA is proposing a separate set of performance requirements that would apply specifically to narrower measurement ranges, *i.e.* ranges extending from zero to concentrations

less than 0.5 ppm. These additional requirements are listed in the proposed revised Table B–1. A candidate analyzer that meets the Table B–1 requirements for the standard measurement range (0 to 0.5 ppm) could optionally have one or more narrower ranges included in its FRM or FEM designation by further testing to show that it meets these supplemental, narrower-range requirements.

At the other (high) end of the concentration measurement spectrum, another related change proposed for § 53.20 would allow optional designation of measurement ranges for SO_2 up to 2 ppm rather than 1 ppm as is now permitted, and designation of these higher ranges would be applicable to both FRM and FEM analyzers. Such higher ranges are often needed for measurement of short-interval SO_2 averages. Finally, EPA is proposing to clarify in § 53.20 that optional testing for auxiliary higher or lower measurement ranges (for all gaseous pollutants) may include tests for only some of the performance parameters, since the test results for the other performance parameters carried out for the standard measurement range would be technically applicable and adequate for the higher and/or lower ranges as well.

EPA believes that these changes in performance requirements are appropriate, based on analyzer performance data available from analyzer manuals and recent FEM applications. EPA solicits comments especially from UVF instrument users and manufacturers on these proposed changes, particularly in regard to whether they are reasonable, appropriate, of significant benefit, and achievable without undue cost. Comments are also requested on such issues as the trade off between a high measurement range and the need for adequate resolution at concentrations near the annual NAAQS, a similar trade off between noise level and response time (some analyzers allow these parameters to be adjusted by the operator or may adjust them automatically based on the rate of change of the concentration level), and whether such performance parameters should be addressed in more detail in 40 CFR Part 53. In particular, should SO_2 analyzer requirements address the potential need for faster measurement response time to permit more accurate monitoring of short-term intervals such as 5-minute or 10-minute averages, and are the special performance requirements EPA is proposing for measuring very low levels (trace levels) of SO_2 appropriate and effective?

Another significant change proposed to 40 CFR Part 53 would add some low and medium level 1-hour comparability tests to the Subpart C comparability test requirements, as specified in Table C–1. These would help to ensure that the 1-hour measurement performance of candidate FEMs are adequate, relative to the FRM. Also, EPA proposes to amend Table A–1 in Subpart A to reflect the new FRM description in proposed new Appendix A–1 of 40 CFR Part 50. This table would also be amended to correct some printing errors in the current table as well as to add new entries related to the new FRM for lead in PM_{10} that was recently promulgated. Other minor changes would be necessary in the wording of a few sections of Subparts A and B due to the proposed change in the nature of the SO_2 FRM from a manual to an automated method or to update the language. These changes are reflected in the proposed regulatory text section of this notice.

EPA proposes additional minor revisions to Tables B–2 and B–3 of Subpart B. The changes proposed to Table B–2 would update some of the analytical methods for generation or verification of SO_2 and interferent test concentrations and their associated references. Similarly, Table B–3 would be updated to add a specific listing for ultraviolet fluorescent methods and to add a few additional interferent test species for some other measurement techniques that have been found from experience to be needed.

B. Network design

1. Background

The basic objectives of an ambient monitoring network, as noted in 40 CFR Part 58 Appendix D, include (1) providing air pollution data to the general public in a timely manner, (2) supporting compliance with ambient air quality standards and emissions strategy development, and (3) providing support for air pollution research. The SO_2 network was originally deployed to support implementation of the SO_2 NAAQS established in 1971. Although the SO_2 standard was established in 1971, EPA did not establish uniform minimum monitoring requirements for SO_2 monitoring until May 1979. From the time of the implementation of the 1979 monitoring rule, through 2008, the SO_2 network has steadily decreased in size from approximately 1496 sites in 1980 to the approximately 488 sites operating in 2008 (Watkins and Thompson, 2009). The reduction in network size is due in part to the change in the source sector contributions to the overall SO_2 inventory and the general decline of ambient SO_2 levels over time. In the early decades of the SO_2 network, particularly the 1970s, there was a wider variety of more ubiquitous SO_2 sources in urban areas, including residential coal and oil furnaces, when compared to the stationary source, electric generating unit (EGU)-dominated inventories of today (see below). The situation in the 1970s led to a network design keyed on population, an appropriate approach at the time considering the close proximity of sources and people, particularly in urban, residential settings (Watkins and Thompson, 2009).

An analysis of the approximately 488 monitoring sites comprising the current (2008) SO_2 monitoring network indicates that just under half (46%) of the sites in the current SO_2 network are reported to be for the assessment of concentrations for general population exposure. As for the present day inventory, the 2005 NEI (*http://www.epa.gov/ttn/chief/net/2005inventory.html*) indicates that SO_2 emissions from EGUs contribute approximately 70% of the anthropogenic SO_2 emissions in the U.S. However, only approximately one third (35%) of the network is reported to be addressing locations of maximum (highest) concentrations, likely linked to a specific source or group of sources such as EGUs.

The current network supports the reporting of 1-hour data to EPA's Air Quality System (AQS) database, as required in § 58.12 of 40 CFR Part 58, since the network utilizes the continuous UVF FEM, which can provide time-resolved data averaged over periods as short as several minutes. The routine submittal of hourly data by state, local, and tribal air monitoring agencies to AQS is suitable for use in comparison to both of the current primary 24-hour and annual NAAQS. There are a few monitoring agencies who also report 5-minute data voluntarily to AQS.

The current network is sited at a variety of spatial scales; however a majority of the network, just over sixty percent, is sited at the neighborhood spatial scale[32] (Watkins and Thompson,

[32] Spatial scales are defined in 40 CFR Part 58 Appendix D, Section 1.2, where the scales of representativeness include:

1. Microscale—Defines the concentration in air volumes associated with area dimensions ranging from several meters up to about 100 meters.

2. Middle scale—Defines the concentration typical of areas up to several city blocks in size, with dimensions ranging from about 100 meters to 0.5 kilometers.

3. Neighborhood scale—Defines concentrations within some extended area of the city that has

Continued

2009). Although there are 488 SO_2 monitors operating in the network, there are currently no minimum monitoring requirements for SO_2 in 40 CFR part 58 Appendix D, other than the following three: (1) SO_2 must be monitored at National Core (NCore) monitoring sites (discussed below), (2) the EPA Regional Administrator must approve the removal of any existing monitors, and (3) any ongoing SO_2 monitoring must have at least one monitor sited to measure the maximum concentration of SO_2 in that area.

The SO_2 monitors that are required as part of the National Core monitoring network (NCore) were not required solely for providing direct support of the SO_2 NAAQS. The monitoring rule promulgated in 2006 (71 FR 61236) and codified at 40 CFR Part 58 and its Appendices established the NCore multi-pollutant network requirement to support integrated air quality management data needs. Further, NCore is intended to establish long-term sites providing data for air quality trends analysis, model evaluation, and, for urban sites, tracking metropolitan air quality statistics. To do this, NCore sites are required to measure various pollutants, including SO_2, but are not sited to monitor maximum concentrations of SO_2. NCore sites provide data representing concentrations at the broader neighborhood and urban spatial scales. The data from the NCore sites will be compared to the NAAQS although, as noted earlier, NAAQS comparisons are not the primary objective of NCore. The NCore network, which will be fully implemented by January 1, 2011, will result in approximately 83 sites, each with an SO_2 monitor, with approximately 60 sites being located in urban areas.

As set out in detail in section II.B of this notice, there is a causal relationship between short-term SO_2 exposure and respiratory morbidity, with ''short-term'' meaning exposures from 5–10 minutes up to and including 24 hours. This finding is based primarily on results from controlled human exposure studies of 5–10 minutes as well as epidemiologic studies using mostly 1-hour daily maximum and 24-hour average SO_2 concentrations. Importantly, the ISA described the controlled human exposure studies of 5–10 minutes as being the ''definitive evidence'' for this conclusion (ISA, section 5.2). In addition, when describing epidemiologic studies observing positive associations between ambient SO_2 and respiratory symptoms, the ISA stated ''that it is possible that these associations are determined in large part by peak exposures within a 24-hour period'' (ISA, section 5.2 at p. 5–5). The ISA also stated that the respiratory effects following 5- to 10-minute SO_2 exposures in controlled human exposure studies provide a basis for a progression of respiratory morbidity that could result in increased ED visits and hospital admissions (ISA, section 5.2). Thus, the monitoring network to support the proposed NAAQS should be focused on identifying the expected maximum short-term concentrations in any particular area.

The ISA (Section 2.1) indicates that point (*i.e.,* stationary) sources account for approximately 95% of the total anthropogenic SO_2 emissions in the U.S. According to the 2005 National Emissions Inventory (*http://www.epa.gov/ttn/chief/net/2005inventory.html*), electrical generating units (EGUs) emit approximately 70% of the anthropogenic SO_2 emissions in the U.S. The 2005 NEI indicates that the total anthropogenic emission inventory of SO_2 is approximately 14,742 thousand tons per year. Of those 14,742 thousand tons per year of emitted SO_2, approximately 85% were emitted by stationary sources that emit 100 or more tons per year (comprising approximately 1,928 of the 32,988 facilities listed in the 2005 NEI). This information indicates that a relatively small number (6%) of all SO_2 emitting stationary sources are responsible for a large majority of the total anthropogenic emissions inventory (85%) in the U.S. Therefore, monitors sited to reflect locations of expected maximum concentrations should be primarily oriented towards locations influenced by one or a cluster of high SO_2 emitting sources.

As noted in the key observations of the exposure analysis of the REA (REA, Section 8.12), there are a variety of factors that influence overall population exposure to ground-level concentrations in a given area, including population density and proximity to sources, emissions density in an area, and source specific emission parameters such as stack height, among other factors. In general, however, it is expected that any short-term peaks that may occur in an area are more likely to occur nearer to a source or sources, or in an area where multiple sources are significantly contributing to increased ground level concentrations (an area with high emissions density).[33] Given that maximum ground-level concentrations of SO_2 are usually directly traceable to specific sources, or a cluster of sources, the network design should support implementation of the proposed 1-hour SO_2 NAAQS by targeting maximum ground-level concentrations in areas of both higher population and higher emissions.

2. Proposed changes

In conjunction with the proposed 1-hour primary NAAQS and (if EPA should adopt a standard at the upper end of the range of levels for which the Agency is soliciting comment) the potential retention of the current 24-hour NAAQS, we are proposing a number of changes to the SO_2 monitoring network. As just noted, there are currently minimum monitoring requirements for SO_2 only at NCore sites. The proposal for a new 1-hour NAAQS necessitates the re-introduction of minimum monitoring requirements. An analysis of the approximately 488 monitoring sites comprising the current (2008) SO_2 monitoring network indicates that just under half (~46%) of the sites in the current SO_2 network are reported to be for the assessment of concentrations for general population exposure. The current network was not originally deployed to address current short-term, peak concentrations, such as those locations nearer to stationary sources or in areas of higher emissions densities, where maximum hourly and 5- to 10-minute concentrations are likely to occur. The Agency has data indicating that only about one third of the existing SO_2 network may be source-oriented monitors and/or sited in locations of expected maximum concentrations (Watkins and Thompson, 2009).

To fully support the proposed SO_2 NAAQS, the monitoring network needs to identify where short-term, peak ground-level concentrations—*i.e.* concentrations from 5 minutes to one hour (or potentially up to 24 hours)—

relatively uniform land use with dimensions in the 0.5 to 4.0 kilometers range.

4. Urban scale—Defines concentrations within an area of city-like dimensions, on the order of 4 to 50 kilometers. Within a city, the geographic placement of sources may result in there being no single site that can be said to represent air quality on an urban scale. The neighborhood and urban scales have the potential to overlap in applications that concern secondarily formed or homogeneously distributed air pollutants.

5. Regional scale—Defines usually a rural area of reasonably homogeneous geography without large sources, and extends from tens to hundreds of kilometers.

[33] There is inherent variability in where peak ground level concentrations may occur in space and time from an individual source or group of sources, due to multiple factors including tons emitted, stack height, meteorology, among others. These factors are discussed further in the Monitor Placement and Siting section of this chapter.

may occur. Due to the multiple variables that affect ground level SO_2 concentrations caused by one or more stationary sources, it is difficult to specify a source specific threshold, algorithm, or metric by which to require monitoring in a rule such as this. To achieve this goal, therefore, EPA is proposing a two-pronged network design to ensure that States perform a sufficient amount of monitoring of ambient concentrations of SO_2 to determine attainment of the proposed SO_2 NAAQS that intends to prevent exposure to peak concentrations. EPA anticipates this two-pronged network would require approximately 345 monitors nationwide, providing data for comparison with both the proposed 1-hour and the 24-hour standard if retained. The network would be wholly comprised of monitors sited at locations of expected maximum hourly concentrations. EPA is proposing that the two prongs of this SO_2 network design would be distributed based on: (1) A Population Weighted Emissions Index (PWEI) and (2) the state-level contribution to the national, SO_2 emissions inventory. EPA notes that although we propose that the network include a minimum number of required monitors, State, local, and tribal agencies may conduct additional monitoring above the minimum requirements. If those additional monitors satisfy all applicable requirements in 40 CFR Part 58, the data from those monitors would be comparable to the NAAQS. EPA estimates that one-half to two-thirds of the monitors in the existing network (excluding any currently operating NCore sites) may have to be moved in order to be counted towards the requirement for monitors sited at locations of expected maximum short-term concentrations of SO_2.

We solicit comment on whether the estimated 348 monitors required by this proposal, distributed based on the two network design components presented below, are too few, too many, or suitable to establish a minimum network sufficient to meet the monitoring objectives noted above, including supporting compliance with the proposed 1-hour SO_2 NAAQS.

We propose that state and, where appropriate, local air monitoring agencies submit a plan for deploying SO_2 monitors in accordance with the proposed requirements presented below by July 1, 2011. We also propose that the SO_2 network being proposed be physically established no later than January 1, 2013. Considering the proposed timeline and criteria presented in the network design, we solicit comment on whether alternative dates would be more appropriate as deadlines for state and local monitoring agencies to submit a monitoring plan. We also solicit comments on whether alternative dates would be more appropriate as deadlines for state and local monitoring agencies to physically deploy monitors.

a. Population weighted emissions index (PWEI) triggered monitoring

The EPA proposes that the first prong of the ambient SO_2 monitoring network account for SO_2 exposure by requiring monitors in locations where population and emissions may lead to higher potential for population exposure to peak hourly SO_2 concentrations. In order to do this, EPA has developed a Population Weighted Emissions Index (PWEI) that uses population and emissions inventory data at the CBSA [34] level to assign required monitoring for a given CBSA (population and emissions being obvious relevant factors in prioritizing numbers of required monitors). The PWEI for a particular CBSA is calculated by multiplying the population (using the latest Census Bureau estimates) of a CBSA by the total amount of SO_2 emissions in that CBSA. The CBSA emission value is in tons per year, and is calculated by aggregating the county level emissions for each county in a CBSA. We then normalize by dividing the resulting product of CBSA population and CBSA SO_2 emissions by 1,000,000 to provide a PWEI value, the units of which are millions of people-tons per year. This calculation has been performed for each CBSA and has been posted in the docket as ''CBSA PWEI Calculation, 2009''. EPA believes that using this PWEI metric to inform where monitoring is required is more appropriate for the SO_2 network design than utilizing a population-only type of approach, so that we may focus monitoring resources in areas of the country where people and emission sources are in greater proximity. In addition, EPA's initial view is that this PWEI concept is appropriate for SO_2 but is not necessarily transferrable to the other criteria pollutants. From a very broad vantage point, SO_2 is exclusively a primarily emitted pollutant (*i.e.* unlike $PM_{2.5}$ and ozone there is no secondary formation of SO_2), is almost exclusively emitted by stationary sources (unlike NO_2, CO, $PM_{2.5}$, thoracic coarse PM, and ozone), and is a gaseous pollutant which is somewhat more subject to transport (unlike Pb in the Total Suspended Particulate (TSP) and PM_{10} size fractions).

We propose that the first prong of the SO_2 network design require monitors in CBSAs, according to the following criteria. For any CBSA with a calculated PWEI value equal to or greater than 1,000,000, a minimum of three SO_2 monitors are required within that CBSA. For any CBSA with a calculated PWEI value equal to or greater than 10,000, but less than 1,000,000, a minimum of two SO_2 monitors are required within that CBSA. For any CBSA with a calculated PWEI value equal to or greater than 5,000, but less than 10,000, a minimum of one SO_2 monitor is required within that CBSA. EPA believes that the monitors required within these breakpoints provide a reasonable minimum number of monitors in a CBSA that considers the combination of population and emissions that exist in a given CBSA. This proposed requirement is based on factors that will ensure highly populated areas will receive monitoring even if the emissions in that area are moderate, which is appropriate given the fact that the greater population creates increased potential for exposure to those moderate sources. Additionally, this proposed requirement also ensures that those areas with higher emissions or emission densities, with moderate or modest populations will receive monitoring since those increased emissions are likely to have a significant impact on whatever population may exist nearby.

EPA estimates that these criteria will result in 231 required sites in 132 CBSAs. We propose that monitors triggered in this first prong of the network design must be sited in locations of expected maximum 1-hour concentrations, at the appropriate spatial scale[35], within the boundaries of a given CBSA. EPA also proposes that when state or local agencies make selections for monitoring sites from a pool of similar candidate site locations, they shall prioritize monitoring where the maximum expected hourly concentrations occur in relative greater proximity to populations. EPA believes that states will likely need to use some form of quantitative analysis, such as

[34] CBSAs are defined by the U.S. Census Bureau, and are comprised of both Metropolitan Statistical Areas and Micropolitan Statistical Areas (*http://www.census.gov*).

[35] Due to the variability in where maximum ground-level concentrations may occur (discussed in the Monitor Siting and Placement section of this chapter), the appropriate spatial scales within which an SO_2 monitor might be placed include the microscale, middle, and neighborhood scales, which are defined in 40 CFR Part 58 Appendix D. [could also refer to the fn above where these are described]

modeling, data analysis, or saturation studies to aid in determining where ground-level SO_2 maxima may occur in a given CBSA. The selection of these sites shall be documented in the Annual Monitoring Network Plan per § 58.10, which includes a requirement for public inspection or comment, and approval by the EPA Regional Administrator.

EPA solicits comment on (1) the use of the Population Weighted Emissions Index (PWEI), (2) the PWEI calculation method, (3) the PWEI breakpoints that correlate to a number of required monitors, (4) the requirement that the monitors shall be sited in locations of expected maximum 1-hour concentration, and (5) that state or local agencies making selections for monitoring sites from a pool of similar candidate site locations shall prioritize monitoring where the maximum expected hourly concentrations occur in relative greater proximity to populations.

EPA recognizes that CBSA populations and emissions inventories change over time, suggesting a need for periodic review of the monitoring network. At the same time, EPA recognizes the advantages of a stable monitoring network. Therefore, while EPA currently provides for updates of the NEI every 3 years, EPA believes that the current network review requirements per § 58.10 which requires an annual network plan and recurring 5-year assessments provide a suitable schedule for planning and assessing the monitoring network. Through the 5-year assessments, states will be in a position to review emissions distributions from updated NEIs to calculate PWEI values for each CBSA and subsequently assess whether the operational monitoring network remains appropriate. EPA proposes that the number of sites required to operate as a result of the PWEI values calculated for each CBSA be reviewed and revised for each CBSA through the 5-year network assessment cycle required in § 58.10. EPA solicits comment on whether such adjustments to the network should be required on a 5-year cycle that matches the general frequency of network assessments or some other frequency.

b. State-level emissions triggered monitoring

As the second prong of the SO_2 network, we are proposing to require a monitor or monitors in each state, allocated by state-level SO_2 emissions. In this prong, EPA proposes to distribute approximately 117 sites, based on the corresponding percent contribution of each individual state to the national anthropogenic SO_2 emission inventory. This prong of the network design is intended to allow a portion of the overall required monitors to be placed where needed, independent of the PWEI, inside or outside of CBSAs. EPA proposes to require monitors, using state boundaries as the geographic unit for allocation purposes, in proportion to a state's SO2 emissions, *i.e.,* a state with higher emissions will be required to have a proportionally higher number of monitors. The proposed percent contribution of individual states is based on the most recent NEI, with SO_2 emissions being aggregated by state. Each one percent (after rounding) would correspond to one required monitor. For example, according to the 2005 NEI, the State of Ohio contributes 8.66% of the total anthropogenic SO_2 inventory, which would correspond to requiring nine monitors to be distributed within Ohio. Further, EPA proposes that each state have at least one monitor required as part of this second prong, even if a particular state contributes less than 0.5% of the total anthropogenic national emissions inventory. As a result, approximately 117 monitoring sites would be required and distributed based on state-level SO_2 emissions in the most recent NEI, which in this case, is the 2005 NEI. EPA solicits comment on the use of state-level emission inventories based on the most recent NEI to proportionally distribute approximately one third (117 sites) of the required monitoring network.

According to the most recent NEI, for this proposed second prong, we estimate the state/percent contribution to the national inventory/required monitor distribution to be:

TABLE 5—STATE-LEVEL EMISSION TRIGGERED MONITORS—THIS TABLE SHOWS STATE AND TERRITORY LEVEL CONTRIBUTIONS TO THE NATIONAL SO_2 INVENTORY AND THE CORRESPONDING NUMBER OF MONITORS REQUIRED FOR EACH STATE AS PROPOSED IN PRONG 2 OF THE PROPOSED NETWORK DESIGN

State or Territory	Percent contribution to the national SO_2 inventory (percent)	Proposed number of required monitors
Alabama	4.02	4
Alaska	0.46	1
American Samoa	N/A	1
Arizona	0.60	1
Arkansas	0.77	1
California	1.48	1
Colorado	0.54	1
Connecticut	0.23	1
Delaware	0.58	1
District of Columbia	0.03	1
Florida	4.40	4
Georgia	5.07	5
Guam	N/A	1
Hawaii	0.08	1
Idaho	0.16	1
Illinois	3.51	4
Indiana	7.10	7
Iowa	1.50	2
Kansas	1.33	1
Kentucky	3.88	4
Louisiana	2.40	2
Maine	0.25	1
Maryland	2.58	3
Massachusetts	1.07	1

TABLE 5—STATE-LEVEL EMISSION TRIGGERED MONITORS—THIS TABLE SHOWS STATE AND TERRITORY LEVEL CONTRIBUTIONS TO THE NATIONAL SO_2 INVENTORY AND THE CORRESPONDING NUMBER OF MONITORS REQUIRED FOR EACH STATE AS PROPOSED IN PRONG 2 OF THE PROPOSED NETWORK DESIGN—Continued

State or Territory	Percent contribution to the national SO_2 inventory (percent)	Proposed number of required monitors
Michigan	3.32	3
Minnesota	1.05	1
Mississippi	0.81	1
Missouri	2.8	3
Montana	0.26	1
Nebraska	0.82	1
Nevada	0.49	1
New Hampshire	0.43	1
New Jersey	0.69	1
New Mexico	0.32	1
New York	2.65	3
North Carolina	4.40	4
North Dakota	1.08	1
Northern Mariana Islands	N/A	1
Ohio	8.66	9
Oklahoma	1.12	1
Oregon	0.32	1
Pennsylvania	7.96	8
Puerto Rico	N/A	1
Rhode Island	0.06	1
South Carolina	2.06	2
South Dakota	0.19	1
Tennessee	2.63	3
Texas	6.34	6
Utah	0.35	1
Vermont	0.05	1
Virgin Islands	N/A	1
Virginia	2.34	2
Washington	0.45	1
West Virginia	3.63	4
Wisconsin	1.79	2
Wyoming	0.83	1

EPA proposes siting requirements for this second prong of required monitors to be the same as those in the first prong: siting in locations of expected maximum 1-hour concentrations, at the appropriate spatial scale, within the boundaries of a given state, and prioritizing the selection of candidate sites where the maximum expected hourly concentrations occur in greater proximity to populations. This again would need to be determined case-by-case using quantitative analysis, such as modeling, data analysis, or saturation studies to aid in determining where ground-level SO_2 maxima may occur in a given state. We propose that these monitors can be located inside or outside of CBSA boundaries. However, if a monitor required by the second prong is placed inside a CBSA that already has a requirement for monitoring due to the first prong of this network design, that monitor would not be allowed to count towards satisfying the first prong requirements. As noted for the first prong of required monitors, the selection of these sites shall be documented in the Annual Monitoring Network Plan per § 58.10, which includes a requirement for public inspection or comment, and approval by the EPA Regional Administrator.

The EPA solicits comment on (1) the use of state-level emission inventories to proportionally distribute required monitors, (2) requiring each state to have at least one monitor under this prong of the network design, and (3) requiring all monitors to be sited in locations of expected maximum 1-hour concentration inside or outside of CBSAs.

EPA recognizes that emissions inventories change over time, suggesting a need for periodic review of the monitoring network. At the same time, EPA recognizes the advantages of a stable monitoring network. Therefore, while EPA currently provides for updates of the NEI every 3 years, EPA believes that the current network review requirements per § 58.10 which requires an annual network plan and recurring 5-year assessments provide a suitable schedule for planning and assessing the monitoring network. Through the 5-year assessments, states will be in a position to review emissions distributions from updated NEIs to assess whether the monitoring requirements remain appropriate. EPA proposes that the number of sites required to operate as a result of state-level emissions be reviewed and revised for each state through the 5-year network assessment cycle required § 58.10. EPA solicits comment on whether such adjustments to the network should be required on a 5-year cycle that matches the general frequency of network assessments or some other frequency.

c. Monitor placement and siting

Sites that are to be placed in locations of expected maximum 1-hour concentrations, will also likely discern 5-minute peaks as well. EPA expects that in general, these locations will be in proximity to larger emitting sources (in tons per year) and/or areas of relatively high emissions densities where multiple sources may be contributing to peak ground-level concentrations. The variability in where such locations exist relative to the

responsible emission source(s) depends on multiple factors including the tonnage emitted by a source (or group of sources), stack height, stack diameter, emission exit velocity, emission temperature, terrain, and meteorology. Depending on these variables, plumes may heavily fumigate areas immediately downwind of a source, or may never truly touch down at all, dispersing into ambient air where SO_2 concentrations continually decrease with increasing distance away from the source. This is illustrated in an example where a relatively large source with a tall stack height may not produce exceedingly high ground level concentrations anywhere along its plume trajectory while a smaller source with a relatively short stack may cause relatively higher ground level concentrations under the same meteorological conditions at the same location. The primary reason for this variability is because the peak impacts of sources with higher stacks will generally be farther downwind and may be more variably located than is the case for sources with shorter stacks. Further, depending on meteorology, an emission plume from an individual source may cause increased ground-level concentrations at any heading, relative to the parent source, corresponding to the prevailing winds.

When analyzing a particular source, a state may find multiple locations where peak ground-level concentrations may occur around an individual source. EPA does not intend for multiple monitors to be sited around or in proximity to one source. Not siting multiple monitors around, or in proximity, to one source ensures that more individual sources or groups of sources will receive attention by the monitoring network. States always have the discretion to perform additional monitoring above the minimum requirements to increase monitoring around a particular source or group of sources.

Due to the variability of how, when, where, and to what degree a source or group of sources can contribute to peak, ground-level SO_2 concentrations, EPA expects that State and local monitoring agencies will need to analyze all relevant information, including available ambient and emissions data, and potentially use air quality modeling or saturation studies to select appropriate monitoring site locations. Further, due to the variability in where maximum ground-level concentrations may occur, the appropriate spatial scales within which a monitor might be placed include the microscale, middle, and neighborhood scales, which are defined in 40 CFR Part 58 Appendix D. EPA believes that states, in evaluating a source (or group of sources) that contribute to a peak ground-level SO_2 concentration that varies with space and time, should identify where the highest concentrations are expected to occur in developing candidate site locations. EPA proposes that when state and local agencies make selections for monitoring sites from candidate site locations, they shall prioritize monitoring where the maximum expected hourly concentrations occur in greater proximity to populations. EPA solicits comment on the role of population exposure in the site selection process.

d. Monitoring required by the regional administrator

In addition to the two prongs of the proposed SO_2 network design, we propose that the Regional Administrator will have discretion to require monitoring above these minimum requirements under prongs 1 and 2, as necessary to address situations where the minimum monitoring requirements are not sufficient to meet monitoring objectives noted above. EPA recognizes that the minimum required monitors in the proposed network design under the two prongs described above are based on indicators that may not provide for all the monitoring that may be necessary in an area. An example where EPA envisions requiring an additional monitor might be a case where a source having modest emissions still has high potential to cause a violation of the NAAQS in a community or neighborhood. This situation might occur where a modest SO_2 source has, for example, a low emission stack and/or is in an area where meteorological conditions cause situations, such as inversions or stagnation, that might lead to high ground-level concentrations of SO_2. In this example, such a monitor might be needed even though a state is fulfilling its monitoring requirements under the first and second prongs of the proposed network design. The purpose of this provision is to monitor in and provide data for otherwise non-monitored locations that have the potential to exceed the level of the NAAQS or that are perceived to have higher exposure risks due to proximity to a source or sources. In such an example, the Regional Administrators may make use of any available data including existing model data, existing data analyses, or screening tools such as AERSCREEN or SCREEN3, to inform a decision of whether or not a monitor should be required for a given area or location. Any monitor required through the Regional Administrator and selected by the state or local agency would be included in the Annual Monitoring Network Plan per § 58.10, which includes a requirement for public inspection or comment, and approval by the EPA Regional Administrator. In any case, EPA encourages state, local, and tribal monitoring agencies to provide input and information to the appropriate Regional Administrators in determining whether additional monitors are needed and the locations of such monitors. We solicit comment on the proposal to allow Regional Administrators the discretion to require monitoring above the requirements under prongs 1 and 2 for any area or location where those monitoring requirements are not sufficient to meet monitoring objectives.

EPA notes that existing requirements detailed in § 58.14(c) address certain conditions where existing monitors can be shut down, with EPA Regional Administrator approval. EPA is not reopening or otherwise reconsidering this provision. However, this requirement is noted here so that state or local agency requests to potentially relocate SO_2 monitors to meet the proposed requirements of prongs 1 or 2 will be considered with the specific provisions of § 58.14(c) in mind.

e. Alternative network design

EPA solicits comments on alternative network designs, including alternative methods to determine the minimum number of monitors per state. We are particularly interested in whether a screening approach for assessing the likelihood of a NAAQS exceedance could be developed and serve as a basis for determining the number and location of required monitors.

More specifically, EPA requests comment on whether it should utilize existing screening tools such as AERSCREEN or SCREEN3, which use parameters such as effective stack height and emissions levels to identify facilities with the potential to cause an exceedance of the proposed standard. For that set of sources, EPA could then require states to conduct more refined modeling (likely using the American Meteorological Society (AMS)/EPA Regulatory Model (AERMOD)) to determine locations where monitoring should be conducted. Any screening or modeling would likely be carried out by states by using EPA recommended models and techniques referenced by 40 CFR Part 51, Appendix W, which provides guidance on air quality modeling. Such screening or modeling uses facility emission tonnage, stack heights, stack diameters, emission temperatures, emission velocities, and accounts for local terrain and meteorology in determining where

expected maximum hourly concentrations may occur. In using this approach, EPA would then require states to locate monitors at the point of maximum concentration around sources identified as likely causing NAAQS exceedances.

This approach could lead to monitors being required at a significantly larger number of locations than under the proposed approach. For example, the NEI shows that 2,407 sources emit 50 tons per year or more of SO_2, while 1,928 sources emit 100 tons per year or more of SO_2. If, for example, the state screening approach found that a substantial fraction of those 50 or 100 ton per year sources had a significant probability of violating the NAAQS, states could be required to model, evaluate, and potentially monitor a corresponding number of sources. EPA also notes that this alternative approach would not distinctly use population as a factor for where monitors should be placed. EPA solicits comment on the resource implications for state and local agencies associated with this approach.

If EPA selects a standard level near the lower end of the proposed range, it is likely that a greater number of areas would exceed the NAAQS, leading to the need for additional monitors. A facility screening approach, as described above would explicitly account for the specific parameters of a facility, air quality information, and the stringency of the standard for determining the number of monitors, in contrast to the proposed approach. EPA solicits comment on how, in the absence of a facility screening approach, the number of monitors required nationwide could be adjusted if EPA finalizes a standard near the lower end of the proposed range.

C. Data reporting

SO_2 UV fluorescence FEMs are continuous gas analyzers, producing updated data values on the order of every 20 seconds. Data values are typically aggregated into minute averages and then compiled into hourly averages for reporting purposes. EPA proposes to retain the existing requirement that State and local monitoring agencies report hourly SO_2 data to AQS within 90 days of the end of each calendar quarter. EPA encourages monitoring agencies to voluntarily report their pre-validated data on an hourly basis to EPA's real time AIRNow data system.

The definitive evidence for the ISA's conclusion of causal association between short-term SO_2 exposure and respiratory morbidity is from controlled human exposure studies of 5–10 minutes in exercising asthmatics (ISA, section 5.2). The REA therefore assessed exposure and risks associated with 5-minute SO_2 concentrations above 5-minute health effect benchmark levels derived from these controlled human exposure studies. In performing these analyses, the REA noted that: (1) The majority of the current SO_2 monitoring network reported 1-hour SO_2 concentrations (REA section 7.2.3); (2) very few state and local agencies in the U.S. voluntary reported ambient 5-minute SO_2 concentrations, as such reporting is not required (REA, section 10.3.3.2); and (3) the lack of 5-minute monitoring data necessitated the use of statistically estimated 5-minute SO_2 concentrations derived from reported 1-hour SO_2 levels (see REA section 7.2.3) in order to expand the geographic scope of the exposure and risk analyses. Thus given the demonstrated importance of 5-minute SO_2 concentrations, EPA proposes that State and local agencies shall report to AQS the maximum 5-minute block average of the twelve 5-minute block averages of SO_2 for each hour, in addition to the existing requirement to report the 1-hour average.

EPA solicits comment on the proposed requirement for state and local monitoring agencies to report both hourly average and the maximum 5-minute block average out of the twelve 5-minute block averages of SO_2 for each hour. EPA also solicits comment on the advantages and disadvantages of alternatively requiring state and local agencies to report all twelve 5-minute SO_2 values for each hour. Having all twelve 5-minute SO_2 values for each hour would provide more detailed information for health research purposes and provide additional information to help inform the next review of the SO_2 standard. We also solicit comment on alternatively requiring state and local agencies to report the maximum 5-minute concentration in an hour based on a moving 5-minute averaging period rather than time block averaging.

EPA notes the potential resource burden with the proposed requirement to report 5-minute average values in addition to 1-hour average values, as is currently required. Accordingly, we solicit comment on the magnitude and importance of this resource burden, recognizing that monitoring agencies utilize a variety of automated data acquisition and management programs, and that the resulting burden of validating and reporting 5-minute data may vary from a relatively trivial matter to an issue of greater importance, depending on the procedures utilized within each agency's data reporting process.

As a part of the larger data quality performance requirements of the ambient monitoring program, we are proposing data quality objectives (DQOs) for the proposed SO_2 network. The DQOs are meant to identify measurement uncertainty for a given pollutant method. We propose a goal for acceptable measurement uncertainty for SO_2 methods to be defined for precision as an upper 90 percent confidence limit for the coefficient of variation (CV) of 15 percent and for bias as an upper 95 percent confidence limit for the absolute bias of 15 percent. We solicit comment on the proposed DQOs and on what the acceptable measurement uncertainty should be.

IV. Proposed Appendix T—Interpretation of the Primary NAAQS for Oxides of Sulfur and Proposed Revisions to the Exceptional Events Rule

The EPA is proposing to add Appendix T, Interpretation of the Primary National Ambient Air Quality Standards for Oxides of Sulfur, to 40 CFR Part 50 in order to provide data handling procedures for the proposed SO_2 1-hour primary standard. The proposed § 50.11 which sets the averaging period, level, indicator and form of the NAAQS refers to this Appendix T. The proposed Appendix T would detail the computations necessary for determining when the proposed 1-hour primary SO_2 NAAQS is met. The proposed Appendix T also would address data reporting, data completeness considerations, and rounding conventions.

Two versions of the proposed Appendix T are printed at the end of this notice. The first applies to a 1-hour primary standard based on the annual 4th high value form, while the second applies to a 1-hour primary standard based on the 99th percentile daily value form. (As explained in section II.F. 3 above, EPA is proposing alternative forms here based on technical analysis that they are equally effective.) The discussion here addresses the first of these versions, followed by a brief description of the differences found in the second version.

For the proposed 1-hour primary standard, EPA is proposing data handling procedures, a proposed addition of a cross-reference to the Exceptional Events Rule, a proposed addition to allow the Administrator discretion to consider otherwise incomplete data to be complete, and a proposed provision addressing the

possibility of there being multiple SO_2 monitors at one site.

The EPA is also proposing SO_2-specific changes to the deadlines in 40 CFR 50.14, by which states must flag ambient air data that they believe have been affected by exceptional events and submit initial descriptions of those events, and to the deadlines by which states must submit detailed justifications to support the exclusion of that data from EPA determinations of attainment or nonattainment with the NAAQS. The deadlines now contained in 40 CFR 50.14 are generic, and are not always appropriate for SO_2 given the anticipated schedule for the designations of areas under the proposed SO_2 NAAQS.

A. Background

The general purpose of a data interpretation appendix is to provide the practical details on how to make a comparison between multi-day and possibly multi-monitor ambient air concentration data and the level of the NAAQS, so that determinations of attainment and nonattainment are as objective as possible. Data interpretation guidelines also provide criteria for determining whether there are sufficient data to make a NAAQS level comparison at all.

The regulatory language for the current SO_2 NAAQS, originally adopted in 1977, contains data interpretation instructions only for the issue of data completeness. This situation contrasts with the situations for ozone, $PM_{2.5}$, PM_{10}, and most recently Pb for which there are detailed data interpretation appendices in 40 CFR Part 50 addressing issues that can arise in comparing monitoring data to the NAAQS. EPA has used its experience developing and applying these other data interpretation appendices to develop the proposed text for Appendix T.

An exceptional event is defined in 40 CFR 50.1 as an event that affects air quality, is not reasonably controllable or preventable, is an event caused by human activity that is unlikely to recur at a particular location or is a natural event, and is determined by the Administrator in accordance with 40 CFR 50.14 to be an exceptional event. Air quality data that is determined, under the procedural steps and substantive criteria specified in section 50.14, to have been affected by an exceptional event may be excluded from consideration when EPA makes a determination that an area is meeting or not meeting the associated NAAQS. The key procedural deadlines in section 50.14 are that a State must notify EPA that data have been affected by an event, *i.e.,* ''flag'' the data in the Air Quality Systems (AQS) database, and provide an initial description of the event by July 1 of the year after the data are collected, and that the State must submit the full justification for exclusion within 3 years after the quarter in which the data were collected. However, if a regulatory decision based on the data, for example a designation action, is anticipated, the schedule is shortened and all information must be submitted to EPA no later than a year before the decision is to be made. This generic schedule presents problems when a NAAQS has been recently revised, as discussed below.

B. Interpretation of the primary NAAQS for oxides of sulfur

The purpose of a data interpretation rule for the SO_2 NAAQS is to give effect to the form, level, averaging time, and indicator specified in the proposed regulatory text at 40 CFR 50.11, anticipating and resolving in advance various future situations that could occur. The proposed Appendix T provides definitions and requirements that apply to the proposed 1-hour primary standard for SO_2. The requirements concern how ambient data are to be reported, what ambient data are to be considered (including the issue of which of multiple monitors' data sets will be used when more than one monitor has operated at a site), and the applicability of the Exceptional Events Rule to the primary SO_2 NAAQS.

1. 1-hour primary standard based on the annual 4th high value form

With regard to data completeness for the proposed 1-hour primary standard, the proposed Appendix follows past EPA practice for other NAAQS pollutants by requiring that in general at least 75% of the monitoring data that should have resulted from following the planned monitoring schedule in a period must be available for the key air quality statistic from that period to be considered valid. For the proposed 1-hour primary SO_2 NAAQS, the key air quality statistics are the daily maximum 1-hour concentrations in three successive years. It is important that sampling within a day encompass the period when concentrations are likely to be highest and that all seasons of the year are well represented. Hence, the 75% requirement is proposed to be applied at the daily and quarterly levels. EPA invites comment on the proposed completeness requirements.

Recognizing that there may be years with incomplete data, the proposed text provides that a design value derived from incomplete data will nevertheless be considered valid in either of two situations.

First, if the design value calculated from at least four days of monitoring observations in each of these years exceeds the level of the 1-hour primary standard, it would be valid. This situation could arise if monitoring was intermittent but high SO_2 levels were measured on enough hours and days for the mean of the three annual 4th highest values to exceed the standard. In this situation, more complete monitoring could not possibly have indicated that the standard was actually met.

Second, we are proposing a diagnostic data substitution test which is intended to identify those cases with incomplete data in which it nevertheless is very likely, if not virtually certain, that the daily 1-hour design value would have been observed to be below the level of the NAAQS if monitoring data had been minimally complete.

The diagnostic test would be applied only if there is at least 50% data capture in each quarter of each year and if the 3-year mean of the observed annual 4th highest maximum hourly values in the incomplete data is below the NAAQS level. The test would substitute a high hypothetical concentration for as much of the missing data as needed to meet the 100% requirement in each quarter. The value that is substituted for the missing values is the highest daily maximum 1-hour observed in the same quarter, looking across all three years under evaluation. If the resulting 3-year design value is below the NAAQS, it is highly likely that the design value calculated from complete data would also have been below the NAAQS, so the original design value indicating compliance would be considered valid.

It should be noted that one possible outcome of applying the proposed substitution test is that a year with incomplete data may nevertheless be determined to not have a valid design value and thus to be unusable in making 1-hour primary NAAQS compliance determinations for that 3-year period. EPA invites comment on incorporating the proposed substitution test into the final rule.

EPA is proposing that the Administrator have general discretion to use incomplete data to calculate design values that would be treated as valid for comparison to the NAAQS despite the incompleteness, either at the request of a state or at her own initiative. Similar provisions exist already for the $PM_{2.5}$ and lead NAAQS, and EPA has recently proposed such provisions to accompany the proposed 1-hour NO_2 and SO_2 NAAQS. The Administrator would

consider monitoring site closures/moves, monitoring diligence, and nearby concentrations in determining whether to use such data.

2. 1-hour primary standard based on the annual 99th percentile daily value form

The second version of the proposed Appendix T appearing at the end of this notice contains proposed interpretation procedures for a 1-hour primary standard based on the 99th percentile daily value form. The 4th high daily value form and the 99th percentile daily value form would yield the same design value in a situation in which every hour and day of the year has reported monitoring data, since the 99th percentile of 365 daily values is the 4th highest value. However, the two forms diverge if data completeness is 82% or less, because in that case the 99th percentile value is the 3rd highest (or higher) value, to compensate for the lack of monitoring data on days when concentrations could also have been high.

Logically, provisions to address possible data incompleteness under the 99th percentile daily value form should be somewhat different from those for the 4th highest form. With a 4th highest form, incompleteness should not invalidate a design value that exceeds the standard, for reasons explained above. With the 99th percentile form, however, a design value exceeding the standard stemming from incomplete data should not automatically be considered valid, because concentrations on the unmonitored days could have been relatively low, such that the actual 99th percentile value for the year could have been lower, and the design value could have been below the standard. The second proposed version of Appendix T accordingly has somewhat different provisions for dealing with data incompleteness. One difference is the addition of another diagnostic test based on data substitution, which in some cases can validate a design value based on incomplete data that exceeds the standard.

The second version of the proposed Appendix T provides a table for determining which day's maximum 1-hour concentration will be used as the 99th percentile concentration for the year. The proposed table is similar to one used now for the 24-hour $PM_{2.5}$ NAAQS, which is based on a 98th percentile form, but adjusted to reflect a 99th percentile form for the 1-hour primary SO_2 standard. The proposed Appendix T also provides instructions for rounding (not truncating) the average of three annual 99th percentile hourly concentrations before comparison to the level of the primary NAAQS.

C. Exceptional events information submission schedule

The Exceptional Events Rule at 40 CFR 50.14 contains generic deadlines for a state to submit to EPA specified information about exceptional events and associated air pollutant concentration data. A state must initially notify EPA that data have been affected by an event by July 1 of the calendar year following the year in which the event occurred; this is done by flagging the data in AQS and providing an initial event description. The state must also, after notice and opportunity for public comment, submit a demonstration to justify any claim within 3 years after the quarter in which the data were collected. However, if a regulatory decision based on the data (for example, a designation action) is anticipated, the schedule to flag data in AQS and submit complete documentation to EPA for review is shortened, and all information must be submitted to EPA no later than one year before the decision is to be made.

These generic deadlines are suitable for the period after initial designations have been made under a NAAQS, when the decision that may depend on data exclusion is a redesignation from attainment to nonattainment or from nonattainment to attainment. However, these deadlines present problems with respect to initial designations under a newly revised NAAQS. One problem is that some of the deadlines, especially the deadlines for flagging some relevant data, may have already passed by the time the revised NAAQS is promulgated. Until the level and form of the NAAQS have been promulgated a state does not know whether the criteria for excluding data (which are tied to the level and form of the NAAQS) were met on a given day. Another problem is that it may not be feasible for information on some exceptional events that may affect final designations to be collected and submitted to EPA at least one year in advance of the final designation decision. This could have the unintended consequence of EPA designating an area nonattainment because of uncontrollable natural or other qualified exceptional events.

The Exceptional Events Rule at § 50.14(c)(2)(v) indicates ''when EPA sets a NAAQS for a new pollutant, or revises the NAAQS for an existing pollutant, it may revise or set a new schedule for flagging data for initial designation of areas for those NAAQS.''

For the specific case of SO_2, EPA anticipates that the signature date for the revised SO_2 NAAQS will be June 2, 2010 (a date specified by Consent Decree), that state/tribal designations recommendations will be due by June 2, 2011, and that initial designations under the revised NAAQS will be made by June 1, 2012 (since June 2, 2012 would be on a Saturday) and will be based on air quality data from the years 2008–2010 or 2009–2011 if there is sufficient data for these data years. (See Section VI below for more detailed discussion of the designation schedule and what data EPA intends to use.) Under the current rule, because final designations would be made by June 1, 2012, all events to be considered during the designations process would have to be flagged and fully documented by states one year prior to designations, by June 1, 2011. A state would not be able to flag and submit documentation regarding events that occurred between June to December 2011 by one year before designations are made in June 2012.

EPA is proposing revisions to 40 CFR 50.14 only to change submission dates for information supporting claimed exceptional events affecting SO_2 data. The proposed rule text at the end of this notice shows the changes that would apply if a revised SO_2 NAAQS is promulgated by June 2, 2010, and designations are made two years after such promulgation. For air quality data collected in 2008, we propose to extend the generic July 1, 2009 deadline for flagging data (and providing a brief initial description of the event) to October 1, 2010. EPA believes this extension would provide adequate time for states to review the impact of exceptional events from 2008 on the revised standard and notify EPA by flagging the relevant data in AQS. EPA is not proposing to change the foreshortened deadline of June 1, 2011 for submitting documentation to justify an SO_2-related exceptional event from 2008. We believe the generic deadline provides adequate time for states to develop and submit proper documentation.

For data collected in 2009, EPA proposes to extend generic deadline of July 1, 2010 for flagging data and providing initial event descriptions to October 1, 2010. EPA is retaining the deadline of June 1, 2011 for states to submit documentation to justify an SO_2-related exceptional event from 2009. EPA plans to assist the states by providing at the time of signature our assessment of which monitoring sites and days have exceeded the NAAQS in 2008 and 2009. For data collected in 2010, EPA is proposing a deadline of June 1, 2011 for flagging data and providing initial event descriptions and

for submitting documentation to justify exclusion of the flagged data. EPA believes that this deadline provides states with adequate time to review and identify potential exceptional events that occur in calendar year 2010, even for those events that might occur late in the year. EPA believes these deadlines will be feasible because experience suggest that exceptional events affecting SO_2 data are few in number and easily assessed, so no state is likely to have a large workload.

If a state intends 2011 data to be considered in SO_2 designations, 2011 data must be flagged and detailed event documentation submitted 60 days after the end of the calendar quarter in which the event occurred or by March 31, 2011, whichever date occurs first. Again, EPA believes these deadlines will be feasible because experience suggest that exceptional events affecting SO_2 data are few in number and easily assessed, so no state is likely to have a large workload.

Table 6 summarizes the proposed designation deadlines discussed in this section and provides designation schedule information from recent, pending or prior NAAQS revisions for other pollutants. If the promulgation date for a revised SO_2 NAAQS occurs on a different date than June 1, 2010 (*i.e.* if the consent decree should be amended—which EPA does not presently anticipate), EPA will revise the final SO_2 exceptional event flagging and documentation submission deadlines accordingly, consistent with this proposal, to provide states with reasonably adequate opportunity to review, identify, and document exceptional events that may affect an area designation under a revised NAAQS. EPA invites comment on these proposed changes in the exceptional event flagging and documentation submission deadlines for the revised SO_2 NAAQS shown in Table 6.

TABLE 6—SCHEDULE FOR EXCEPTIONAL EVENT FLAGGING AND DOCUMENTATION SUBMISSION FOR DATA TO BE USED IN DESIGNATIONS DECISIONS FOR NEW OR REVISED NAAQS

NAAQS pollutant/ standard/(level)/ promulgation date	Air quality data collected for calendar year	Event flagging & initial description deadline	Detailed documentation submission deadline
$PM_{2.5}$/24-Hr Standard (35 μg/m³) Promulgated October 17, 2006.	2004–2006	October 1, 2007 [a]	April 15, 2008 [a].
Ozone/8-Hr Standard (0.075 ppm) Promulgated March 12, 2008.	2005–2007	June 18, 2009 [a]	June 18, 2009 [a].
	2008	June 18, 2009 [a]	June 18, 2009 [a].
	2009	60 Days after the end of the calendar quarter in which the event occurred or February 5, 2010, whichever date occurs first [b].	60 Days after the end of the calendar quarter in which the event occurred or February 5, 2010, whichever date occurs first [b].
NO_2/1-Hour Standard (80–100 Ppb, Final Level Tbd).	2008	July 1, 2010 [a]	January 22, 2011 [a].
	2009	July 1, 2010 [a]	January 22, 2011 [a].
	2010	April 1, 2011 [a]	July 1, 2011 [a].
SO_2/1-Hour Standard (50–100 PPB, Final Level Tbd).	2008	October 1, 2010 [b]	June 1, 2011 [b].
	2009	October 1, 2010 [b]	June 1, 2011 [b].
	2010	June 1, 2011 [b]	June 1, 2011 [b].
	2011	60 Days after the end of the calendar quarter in which the event occurred or March 31, 2011, whichever date occurs first [b].	60 Days after the end of the calendar quarter in which the event occurred or March 31, 2011, whichever date occurs first [b].

[a] These dates are unchanged from those published In the original rulemaking, or are being proposed elsewhere and are shown in this table for informational purposes—the agency is not opening these dates for comment under this rulemaking.

[b] Indicates change from general schedule In 40 CFR 50.14.

Note: EPA notes that the table of revised deadlines *only* applies to data EPA will use to establish the final initial designations for new or revised NAAQS. The general schedule applies for all other purposes, most notably, for data used by EPA for redesignations to attainment.

V. Designations for the SO_2 NAAQS

After EPA establishes or revises a NAAQS, the CAA directs EPA and the states to begin taking steps to ensure that the new or revised NAAQS is met. The first step is to identify areas of the country that do not meet the new or revised NAAQS. This step is known as the initial area designations.

Section 107(d)(1)(A) of the CAA provides that, ''By such date as the Administrator may reasonably require, but not later than 1 year after promulgation of a new or revised NAAQS for any pollutant under section 109, the Governor of each state shall * * * submit to the Administrator a list of all areas (or portions thereof) in the state'' that designates those areas as nonattainment, attainment, or unclassifiable. The CAA section 107(d)(1)(A)(i) defines an area as nonattainment if it is violating the NAAQS or if it is contributing to a violation in a nearby area.

Section 107(d)(1)(B)(i) further provides, ''Upon promulgation or revision of a NAAQS, the Administrator shall promulgate the designations of all areas (or portions thereof) * * * as expeditiously as practicable, but in no case later than 2 years from the date of promulgation. Such period may be extended for up to one year in the event the Administrator has insufficient information to promulgate the designations within 2 years. By no later than 120 days prior to promulgating designations, EPA is required to notify states of any intended modifications to their boundaries as EPA may deem necessary. States then have an opportunity to comment on EPA's intended decisions. (See section 107(d)(1)(B)(ii).) Whether or not a state provides a recommendation, EPA must promulgate the designation that the Agency deems appropriate.

Therefore, following promulgation of any revised SO_2 NAAQS in June 2010, EPA must promulgate initial designations by June 2012, or, by June 2013 in the event that the Administrator has insufficient information to promulgate initial designations within 2 years. Along with the proposal to set a

new 1-hour primary SO_2 NAAQS, elsewhere in this action, EPA is proposing new SO_2 ambient air monitoring network requirements. As proposed, any new monitors would be deployed no later than January 1, 2013. Compliance with the proposed 1-hour SO_2 NAAQS would be determined based on 3 years of complete, quality assured, certified monitoring data. We do not expect newly sited monitors for the proposed new network to generate sufficient monitoring data for EPA to use in determining whether areas are in compliance with the revised SO_2 NAAQS by the statutory deadline for EPA to complete initial designations, even if EPA were to take an additional third year. Therefore, EPA intends to complete the designations on a 2-year schedule, by June 2012, based on 3 years of complete, quality assured, certified air quality monitoring data from the current monitoring network.

EPA expects to base designations on air quality data from the years 2008–2010 or 2009–2011. Because the new monitoring network requirements would not apply until January 1, 2013, EPA expects that many SO_2 monitors now operating will continue in operation at their current locations at least through the end of 2011.[36] The SO_2 monitors in the current network were generally sited to measure the highest 24-hour and annual average SO_2 concentrations. However, all of the monitors report hourly data. EPA estimates that around 488 monitors operated in 2008. EPA believes at least one third of the monitors meet the proposed network design requirements and therefore would not need to be moved. Additional monitors may be retained in their current locations if they are measuring high levels of SO_2. If a monitor in the existing network indicates a violation of the 1-hour SO_2 NAAQS, EPA intends to designate the area nonattainment, regardless of whether or not the monitor is located such that it could be counted towards meeting the proposed new network requirements. However, if the monitor indicates that the monitoring site meets the 1-hour SO_2 NAAQS, EPA's decision on the designation of the area would be made on a case-by-case basis. One possible outcome is that the area may be designated as unclassifiable because EPA would be unable to determine whether the area is violating the 1-hour SO_2 NAAQS, or contributing to a violation in a nearby area, because of a lack of a complete monitoring network meeting the new network requirements.

Accordingly, state Governors would need to submit their initial designation recommendations to EPA no later than June 2011. If the Administrator intends to modify any state recommendation, EPA would notify the state's Governor no later than February 2012, 120 days prior to promulgating the final designations. States would then have an opportunity to comment on EPA's tentative decisions before EPA promulgates the final designations in June 2012.

While CAA section 107 specifically addresses states, EPA intends to follow the same process for tribes to the extent practicable, pursuant to section 301(d) of the CAA regarding tribal authority, and the Tribal Authority Rule (63 FR 7254; February 12, 1998). Pursuant to the Tribal Authority Rule, Tribes are not subject to the schedule requirements that apply to states. However, EPA intends to promulgate designations for Tribal land as well as state land according to the schedule mandated for state land, so EPA encourages Tribes that wish to provide input on EPA's designations to provide this input on the schedule mandated for states.

VI. Clean Air Act Implementation Requirements

This section of the preamble discusses the Clean Air Act (CAA) requirements that states and emissions sources would need to address when implementing new or revised SO_2 NAAQS based on the structure outlined in the CAA and existing rules.[37] The EPA believes that there are sufficient guidance documents and regulations currently in place to fully implement the proposed revision to the SO_2 NAAQS.[38] However, EPA may provide additional guidance in the future, as necessary, to assist states and emissions sources to comply with the CAA provisions for implementing a new or revised SO_2 NAAQS.

The CAA assigns important roles to EPA, states and tribal governments to achieve the NAAQS. States have the primary responsibility for developing and implementing state implementation plans (SIPs) that contain state measures necessary to achieve the air quality standards in each area once EPA has established the NAAQS. EPA provides assistance to states and tribes by providing technical tools, assistance, and guidance, including information on the potential control measures that may assist in helping areas attain the standards.

Under section 110 of the CAA, 42 U.S.C. 7410, and related provisions, states are directed to submit, for EPA approval, SIPs that provide for the attainment and maintenance of such standards through control programs directed at sources of SO_2 emissions. If a state fails to adopt and implement the required SIPs by the time periods provided in the CAA, EPA has the responsibility under the CAA to adopt a federal implementation plan (FIP) to assure that areas attain the NAAQS in an expeditious manner. The states, in conjunction with EPA, also administer the prevention of significant deterioration (PSD) program for SO_2. See sections 160–169 of the CAA, 42 U.S.C. 7470–7479. In addition, federal programs provide for nationwide reductions in emissions of SO_2 and other air pollutants under Title II of the Act, 42 U.S.C. 7521–7574. These programs involve limits on the sulfur content of the fuel used by automobiles, trucks, buses, motorcycles, non-road engines and equipment, marine vessels and locomotives. EPA is also in the process of establishing limits on the sulfur content of the fuel used by ocean going vessels. Emissions reductions for SO_2 are also obtained from implementation of the new source performance standards (NSPS) for stationary sources under sections 111 and 129 of the CAA, 42 U.S.C. 7411 and 7429; and the national emission standards for hazardous air pollutants (NESHAP) for stationary sources under section 112 of the CAA, 42 U.S.C. 7412.

A. How this rule applies to tribes

CAA section 301(d) authorizes EPA to treat eligible Indian tribes in the same manner as states (TAS) under the CAA and requires EPA to promulgate regulations specifying the provisions of the statute for which such treatment is appropriate. EPA has promulgated these regulations—known as the Tribal Authority Rule or TAR—at 40 CFR Part 49. See 63 FR 7254 (February 12, 1998). The TAR establishes the process for Indian tribes to seek TAS eligibility and sets forth the CAA functions for which TAS will be available. Under the TAR, eligible tribes may seek approval for all CAA and regulatory purposes other than a small number of functions enumerated at section 49.4. Implementation plans

[36] EPA Regional Administrator approval will be required for any state to discontinue an existing monitoring site, and EPA does not expect that it will before 2011 approve discontinuation of monitoring at any site which appears to have a substantial likelihood of violating the 1-hour NAAQS.

[37] Since EPA is proposing to take comments on retaining the current 24-hr standards without revision if the 1-hr standard is set at 100–150 ppb, the discussion in this section relates to implementation of the proposed 1-hour standard and the possible retention or revocation of the current 24-hr standard.

[38] See SO_2 Guideline Document, Office of Air Quality Planning and Standards, Research Triangle Park, NC 27711, EPA–452/R–94–008, February 1994.

under section 110 are included within the scope of CAA functions for which eligible tribes may obtain approval. Section 110(o) also specifically describes tribal roles in submitting implementation plans. Eligible Indian tribes may thus submit implementation plans covering their reservations and other areas under their jurisdiction.

The CAA and TAR do not, however, direct tribes to apply for TAS or implement any CAA program. In promulgating the TAR EPA explicitly determined that it was not appropriate to treat tribes similarly to states for purposes of, among other things, specific plan submittal and implementation deadlines for NAAQS-related requirements. 40 CFR 49.4(a). In addition, where tribes do seek approval of CAA programs, including section 110 implementation plans, the TAR provides flexibility and allows them to submit partial program elements, so long as such elements are reasonably severable—*i.e.,* ''not integrally related to program elements that are not included in the plan submittal, and are consistent with applicable statutory and regulatory requirements''. 40 CFR 49.7.

To date, very few tribes have sought TAS for purposes of section 110 implementation plans. However, some tribes may be interested in pursuing such plans to implement today's proposed standard, once it is promulgated. In several sections of this preamble, EPA describes the various roles and requirements states will address in implementing today's proposed standard. Such references to states generally include eligible Indian tribes to the extent consistent with the flexibility provided to tribes under the TAR. Where tribes do not seek TAS for section 110 implementation plans, EPA under its discretionary authority will promulgate FIPs as ''necessary or appropriate to protect air quality.'' 40 CFR 49.11(a). EPA also notes that some tribes operate air quality monitoring networks in their areas. For such monitors to be used to measure attainment with the proposed revised primary NAAQS for SO_2, the criteria and procedures identified in this proposed rule would apply.

B. Attainment dates

The latest date by which an area is required to attain the SO_2 NAAQS is determined from the effective date of the nonattainment designation for the affected area. For areas designated nonattainment for the revised SO_2 NAAQS, SIPs must provide for attainment of the NAAQS as expeditiously as practicable, but no later than 5 years from the effective date of the nonattainment designation for the area. See section 192(a) of the CAA. The EPA will determine whether an area has demonstrated attainment of the SO_2 NAAQS by evaluating air quality monitoring data consistent with the form of the NAAQS for SO_2, if revised, which will be codified at 40 CFR part 50, Appendix T.

1. Attaining the NAAQS

In order for an area to be redesignated as attainment, it must meet five conditions provided under section 107(d)(3)(E) of the CAA. This section requires that:

- EPA must have determined that the area has met the SO_2 NAAQS;
- EPA has fully approved the state's implementation plan;
- The improvement in air quality in the affected area is due to permanent and enforceable reductions in emissions;
- EPA has fully approved a maintenance plan for the area; and
- The state(s) containing the area have met all applicable requirements under section 110 and part D.

2. Consequences of failing to attain by the statutory attainment date

Any SO_2 nonattainment area that fails to attain by its statutory attainment date would be subject to the requirements of sections 179(c) and (d) of the CAA. EPA is required to make a finding of failure to attain no later than 6 months after the specified attainment date and publish a notice in the **Federal Register.** The state would then need to submit an implementation plan revision no later than one year following the effective date of the **Federal Register** notice making the determination of the area's failure to attain. This submission must demonstrate that the standard will be attained as expeditiously as practicable, but no later than 5 years from the effective date of EPA's finding that the area failed to attain. In addition, section 179(d)(2) provides that the SIP revision must include any specific additional measures as may be reasonably prescribed by EPA, including ''all measures that can be feasibly implemented in the area in light of technological achievability, costs, and any nonair quality and other air quality-related health and environmental impacts.''

C. Section 110(a)(1) and (2) NAAQS infrastructure requirements

Section 110(a)(2) of the CAA directs all states to develop and maintain a solid air quality management infrastructure, including enforceable emission limitations, an ambient monitoring program, an enforcement program, air quality modeling capabilities, and adequate personnel, resources, and legal authority. Section 110(a)(2)(D) also requires state plans to prohibit emissions from within the state which contribute significantly to nonattainment or maintenance areas in any other state, or which interfere with programs under part C of the CAA to prevent significant deterioration of air quality or to achieve reasonable progress toward the national visibility goal for Federal class I areas (national parks and wilderness areas).

Under sections 110(a)(1) and (2) of the CAA, all states are directed to submit SIPs to EPA which demonstrate that basic program elements have been addressed within 3 years of the promulgation of any new or revised NAAQS. Subsections (A) through (M) of section 110(a)(2) set forth the elements that a state's program must contain in the SIP.[39] The list of section 110(a)(2) NAAQS implementation requirements are the following:

- Ambient air quality monitoring/data system: Section 110(a)(2)(B) requires SIPs to provide for setting up and operating ambient air quality monitors, collecting and analyzing data and making these data available to EPA upon request.
- Program for enforcement of control measures: Section 110(a)(2)(C) requires SIPs to include a program providing for enforcement of SIP measures and the regulation and permitting of new/modified sources.
- Interstate transport: Section 110(a)(2)(D) requires SIPs to include provisions prohibiting any source or other type of emissions activity in the state from contributing significantly to nonattainment or interfering with maintenance of the NAAQS in another state, or from interfering with measures required to prevent significant deterioration of air quality or to protect visibility.
- Adequate resources: Section 110(a)(2)(E) directs states to provide assurances of adequate funding, personnel and legal authority to implement their SIPs.
- Stationary source monitoring system: Section 110(a)(2)(F) directs

[39] Two elements identified in section 110(a)(2) are not listed below because, as EPA interprets the CAA, SIPs incorporating any necessary local nonattainment area controls would not be due within 3 years, but rather are due at the time the nonattainment area planning requirements are due. These elements are: (1) Emission limits and other control measures, section 110(a)(2)(A), and (2) Provisions for meeting part D, section 110(a)(2)(I), which requires areas designated as nonattainment to meet the applicable nonattainment planning requirements of part D, title I of the CAA.

states to establish a system to monitor emissions from stationary sources and to submit periodic emissions reports to EPA.

• Emergency power: Section 110(a)(2)(G) directs states to include contingency plans, and adequate authority to implement them, for emergency episodes in their SIPs.

• Provisions for SIP revision due to NAAQS changes or findings of inadequacies: Section 110(a)(2)(H) directs states to provide for revisions of their SIPs in response to changes in the NAAQS, availability of improved methods for attaining the NAAQS, or in response to an EPA finding that the SIP is inadequate.

• Consultation with local and Federal government officials: Section 110(a)(2)(J) directs states to meet applicable local and Federal government consultation requirements when developing SIPs and reviewing preconstruction permits.

• Public notification of NAAQS exceedances: Section 110(a)(2)(J) directs states to adopt measures to notify the public of instances or areas in which a NAAQS is exceeded.

• PSD and visibility protection: Section 110(a)(2)(J) also directs states to adopt emissions limitations, and such other measures, as may be necessary to prevent significant deterioration of air quality in attainment areas and protect visibility in Federal Class I areas in accordance with the requirements of CAA Title I, part C.

• Air quality modeling/data: Section 110(a)(2)(K) requires that SIPs provide for performing air quality modeling for predicting effects on air quality of emissions of any NAAQS pollutant and submission of data to EPA upon request.

• Permitting fees: Section 110(a)(2)(L) requires the SIP to include requirements for each major stationary source to pay permitting fees to cover the cost of reviewing, approving, implementing and enforcing a permit.

• Consultation/participation by affected local government: Section 110(a)(2)(M) directs states to provide for consultation and participation by local political subdivisions affected by the SIP.

D. Attainment planning requirements

1. SO_2 nonattainment area SIP requirements

Any state containing an area designated as nonattainment with respect to the SO_2 NAAQS would need to develop for submission to EPA a SIP meeting the requirements of part D, Title I, of the CAA, providing for attainment by the applicable statutory attainment date. See sections 191(a) and 192(a) of the CAA. As indicated in section 191(a), all components of the SO_2 part D SIP must be submitted within 18 months of the effective date of an area's designation as nonattainment.

Section 172 of the CAA addresses the general requirements for areas designated as nonattainment. Section 172(c) directs states with nonattainment areas to submit a SIP which contains an attainment demonstration showing that the affected area will attain the standard by the applicable statutory attainment date. The SIP must show that the area will attain the standard as expeditiously as practicable, and must ''provide for the implementation of all Reasonably Available Control Measures (RACM) as expeditiously as practicable (including such reductions in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of Reasonably Available Control Technology (RACT)).''

SIPs required under Part D of the CAA must also provide for reasonable further progress (RFP). See section 172(c)(2) of the CAA. The CAA defines RFP as ''such annual incremental reductions in emissions of the relevant air pollution as are required by part D, or may reasonably be required by the Administrator for the purpose of ensuring attainment of the applicable NAAQS by the applicable attainment date.'' See section 171 of the CAA. Historically, for some pollutants, RFP has been met by showing annual incremental emission reductions sufficient to maintain generally linear progress toward attainment by the applicable attainment date.

All SO_2 nonattainment area SIPs must include contingency measures which must be implemented in the event that an area fails to meet RFP or fails to attain the standards by its attainment date. See section 172(c)(9) of the CAA. These contingency measures must be fully adopted rules or control measures that take effect without further action by the state or the Administrator. The EPA interprets this requirement to mean that the contingency measures must be implemented with only minimal further action by the state or the affected sources with no additional rulemaking actions such as public hearings or legislative review.

Emission inventories are also critical for the efforts of state, local, and federal agencies to attain and maintain the NAAQS that EPA has established for criteria pollutants including SO_2. Section 191(a) in conjunction with section 172(c) requires that areas designated as nonattainment for SO_2 submit an emission inventory to EPA no later than 18 months after designation as nonattainment. In the case of SO_2, sections 191(a) and 172(c) also direct states to submit periodic emission inventories for nonattainment areas. The periodic inventory must include emissions of SO_2 for point, nonpoint, mobile, and area sources.

2. New source review and prevention of significant deterioration requirements

The Prevention of Significant Deterioration (PSD) and nonattainment New Source Review (NSR) programs contained in parts C and D of Title I of the CAA govern preconstruction review of any new or modified major stationary sources of air pollutants regulated under the CAA as well as any precursors to the formation of that pollutant when identified for regulation by the Administrator.[40] The EPA rules addressing these programs can be found at 40 CFR 51.165, 51.166, 52.21, 52.24, and Part 51, appendix S.

The PSD program applies when a major source located in an area that is designated as attainment or unclassifiable for any criteria pollutant is constructed or undergoes a major modification.[41] The nonattainment NSR program applies on a pollutant-specific basis when a major source constructs or modifies in an area that is designated as nonattainment for that pollutant. The minor NSR program addresses major and minor sources that undergo construction or modification activities that do not qualify as major, and it applies, as necessary to assure attainment, regardless of the designation of the area in which a source is located.

PSD permit requirements are effective on the promulgation date of a new or revised standard. SIPs that address the PSD requirements related to attainment areas are due no later than 3 years after the promulgation of a revised NAAQS for SO_2. The PSD requirements include but are not limited to the following:

• Installation of Best Available Control Technology (BACT);

• Air quality monitoring and modeling analyses to ensure that a project's emissions will not cause or contribute to a violation of any NAAQS

[40] The terms ''major'' and ''minor'' define the size of a stationary source, for applicability purposes, in terms of an annual emissions rate (tons per year, tpy) for a pollutant. Generally, a minor source is any source that is not ''major.'' ''Major'' is defined by the applicable regulations—PSD or nonattainment NSR.

[41] In addition, the PSD program applies to non-criteria pollutants subject to regulation under the Act, except those pollutants regulated under section 112 and pollutants subject to regulation only under section 211(o).

or maximum allowable pollutant increase (PSD increment);

• Notification of Federal Land Manager of nearby Class I areas; and public comment on the permit.

If EPA establishes a 1-hour NAAQS for SO_2, the owner or operator of any major stationary source or major modification locating in an attainment or unclassifiable area for SO_2 will be required, as a prerequisite for a PSD permit, to demonstrate that the emissions increases from the new or modified source will not cause or contribute to a violation of the that new NAAQS. The EPA does not anticipate that this will pose a technical problem, since the modeling capability and SO_2 emissions input data already exist. Depending on the final form of the 1-hour NAAQS, it may be necessary to make adjustments to the AERMOD modeling system to accommodate the form of the standard; however, EPA anticipates that any such adjustments can be readily accomplished in coordination with the promulgation of any new NAAQS for SO_2 in time to enable states to implement such standard via the PSD program. The analyses for the 1-hour NAAQS will be in addition to the existing demonstration of compliance for the annual and 24-hour SO_2 NAAQS, which will continue to be required unless EPA revokes these standards in conjunction with its promulgation of a new 1-hour NAAQS for SO_2.

The owner or operator of a new or modified source will still be required to demonstrate compliance with the annual and 24-hour SO_2 increments, even if their counterpart NAAQS are revoked. The annual and 24-hour increments are established in the CAA and will need to remain in the PSD regulations because EPA does not interpret the Clean Air Act to authorize EPA to remove them. It appears necessary for Congress to amend the Act to make appropriate changes to the statutory SO_2 increments, perhaps similar to the way the Act was amended to accommodate PM_{10} increments in lieu of the statutory TSP increments. If we establish a new 1-hour SO_2 NAAQS, EPA will consider the need to adopt new 1-hour SO_2 increments.

In association with the requirement to demonstrate compliance with the NAAQS and increments, the owner or operator of a new or modified source must submit for review and approval a source impact analysis and an air quality analysis. The source impact analysis, primarily a modeling analysis, must demonstrate that allowable emissions increases from the proposed source or modification, in conjunction with emissions from other existing sources will not cause or contribute to either a NAAQS or increment violation. The air quality analysis must assess the ambient air quality in the area that the proposed source or modification would affect.

For the air quality analysis, the owner or operator must submit in its permit application air quality monitoring data that shall have been gathered over a period of one year and is representative of air quality in the area of the proposed project. If existing data representative of the area of the proposed project is not available, new data may need to be collected by the owner or operator of the source or modification. Where data is already available, it might be necessary to evaluate the location of the monitoring sites from which the SO_2 data were collected in comparison to any new siting requirements associated with the 1-hour NAAQS. If existing sites are inappropriate for providing the necessary representative data, then new monitoring data will need to be collected by the owner or operator of the proposed project.

Historically, EPA has allowed the use of several screening tools to help facilitate the implementation of the new source review program by reducing the permit applicant's burden, and streamlining the permitting process for de minimis circumstances. These screening tools include a significant emissions rate (SER), significant impact levels (SILs), and a significant monitoring concentration (SMC). The SER, as defined in tons per year for each regulated pollutant, is used to determine whether any proposed source or modification will emit sufficient amounts of a particular pollutant to require the review of that pollutant under the NSR permit program. EPA will consider whether to evaluate the existing significant emissions rate (SER) for SO_2 to see if it would change substantially based on the NAAQS levels for the 1-hour averaging period. Historically, we have defined a de minimis pollutant impact as one that results in a modeled ambient impact of less than approximately 4% of the short-term NAAQS. The current SER for SO_2 (40 tpy) is based on the impact on the 24-hour SO_2 NAAQS. See, 45 FR 52676, 52707 (August 7, 1980). We have typically used the most sensitive averaging period to calculate the SER, and we may want to evaluate the new 1-hour period for SO_2 because it is likely to represent most sensitive averaging period for SO_2.

The SIL, expressed as an ambient pollutant concentration ($\mu g/m^3$), is used to determine whether the impact of a particular pollutant is significant enough to warrant a complete air quality impact analysis for any applicable NAAQS and increments. EPA has promulgated regulations under 40 CFR 51.165(b) which include SILs for SO_2 to determine whether a source's impact would be considered to cause or contribute to a NAAQS violation for either the 3-hour, 24-hour or annual averaging periods. These SILs were originally developed in 1978 to limit the application of air quality dispersion models to a downwind distance of no more than 50 kilometers or to ''insignificant levels.'' See, 43 FR 26398, June 19, 1978. Through guidance, EPA has also allowed the use of SILs to determine whether or not it is necessary for a source to carry out a comprehensive source impact analysis and to determine the extent of the impact area in which the analysis will be carried out. The existing SILs for SO_2 were not developed on the basis of specific SO_2 NAAQS levels, so if the existing NAAQS are not being revised, there is probably no need to revise the existing SILs. Even if we decide to revoke any of the existing NAAQS, the corresponding SIL should still be useful for increment assessment. A SIL for the 1-hour averaging period does not exist, and would need to be developed for use with modeling for 1-hour SO_2 NAAQS and increments (if and when developed).

Finally, the SMC, also measured as an ambient pollutant concentration ($\mu g/m^3$), is used to determine whether it may be appropriate to exempt a proposed project from the requirement to collect ambient monitoring data for a particular pollutant as part of a complete permit application. EPA first defined SMCs for regulated pollutants under the PSD program in 1980. See, 45 FR 52676, 52709–10 (August 7, 1980). The existing SMC for SO_2, based on a 24-hour averaging period, may need to be re-evaluated to consider the effect of basing the SMC on the 1-hour averaging period, especially in light of the fact that we may revoke the NAAQS for the 24-hour averaging period. Third, even if the 1-hour averaging period does not indicate the need for a revised SMC for SO_2, the fact that the original SMC for SO_2 is based on 1980 monitoring data (Lowest Detectable Level, correction factor of ''5''), could be a basis for revising the existing value. More up-to-date monitoring data and statistical analyses of monitoring accuracy may yield a different—possibly lower—correction factor today. A new 1-hour NAAQS would not necessarily cause this result, but may provide a ''window

of opportunity'' to re-evaluate the SMC for SO_2. See sections II.E.2 and II.F.2 above.

As a means of reducing the permit applicant's burden, and to streamline permitting, permit authorities use screening tools referred to as significant impact levels (SILs) and a significant monitoring concentration (SMC). EPA issued unofficial SO_2 SILs for the 3-hour (secondary standard), 24-hour and annual averaging periods. These SILs were developed in 1978 to limit the application of air quality dispersion models to a downwind distance of no more than 50 kilometers or to ''insignificant levels.'' See, 43 FR 263—, 26398, (June 19, 1978). These values were not developed on the basis of specific SO_2 NAAQS levels, so if the existing NAAQS are not being revised, there is probably no need to revise the existing SILs. Even if we decide to revoke any of the existing NAAQS, the corresponding SIL should still be useful for increment assessment. A SIL for the 1-hour averaging period does not exist, and would need to be developed for use with modeling for the 1-hour SO_2 NAAQS and increments (if and when developed).

States which have areas designated as nonattainment for the SO_2 NAAQS are directed to submit, as a part of the SIP due 18 months after an area is designated as nonattainment, provisions requiring permits for the construction and operation of new or modified stationary sources anywhere in the nonattainment area. Prior to adoption of the SIP revision addressing major source nonattainment NSR for SO_2 nonattainment areas, the requirements of 40 CFR part 51, appendix S will apply. Nonattainment NSR requirements include but are not limited to:

- Installation of Lowest Achievable Emissions Rate (LAER) control technology;
- Offsetting new emissions with creditable emissions reductions;
- A certification that all major sources owned and operated in the state by the same owner are in compliance with all applicable requirements under the CAA;
- An alternative siting analysis demonstrating that the benefits of a proposed source significantly outweigh the environmental and social costs imposed as a result of its location, construction, or modification; and
- Public comment on the permit.

Minor NSR programs must meet the statutory requirements in section 110(a)(2)(C) of the CAA which requires ''* * * regulation of the modification and construction of any stationary source * * * as necessary to assure that the [NAAQS] are achieved.'' These programs must be established in each state within 3 years of the promulgation of a new or revised NAAQS.

3. General conformity

Section 176(c) of the CAA requires that all federal actions conform to an applicable implementation plan developed pursuant to section 110 and part D of the CAA. The EPA rules developed under section 176(c) prescribe the criteria and procedures for demonstrating and assuring conformity of federal actions to a SIP. Each federal agency must determine that any actions covered by the general conformity rule conform to the applicable SIP before the action is taken. The criteria and procedures for conformity apply only in nonattainment areas and those areas redesignated attainment since 1990 (''maintenance areas'') with respect to the criteria pollutants under the CAA [42]: carbon monoxide (CO), lead (Pb), nitrogen dioxide (NO_2), ozone (O3), particulate matter ($PM_{2.5}$ and PM_{10}), and sulfur dioxide (SO_2). The general conformity rules apply one year following the effective date of designations for any new or revised NAAQS.[43]

The general conformity determination examines the impacts of direct and indirect emissions related to federal actions. The general conformity rule provides several options to satisfy air quality criteria, such as modeling or offsets, and requires the federal action to also meet any applicable SIP requirements and emissions milestones. The general conformity rule also requires that notices of draft and final general conformity determinations be provided directly to air quality regulatory agencies and to the public by publication in a local newspaper.

E. Transition from the existing SO_2 NAAQS to a revised SO_2 NAAQS

As stated in section II.F.5 of this notice, in addition to proposing a short-term 1-hour SO_2 NAAQS, EPA is proposing to revoke the current annual and 24-hour standards, (annual 0.03 ppm and 24-hour 0.14 ppm). Specifically, EPA is proposing that the level for the 1-hour standard for SO_2 be a range between 50–100 ppb, and is taking comment on setting the level of the standard up to 150 ppb. If the Administrator sets the 1-hour standard at 100 ppb or lower, EPA is proposing to revoke the current 24-hour standard. If the Administrator sets the level of the 1-hour standard between a range of 100–150 ppb, then EPA would retain the current 24-hour standard.

If EPA revises the SO_2 NAAQS and revokes either the current annual or 24-hour standard, EPA would need to promulgate adequate anti-backsliding provisions. The CAA establishes anti-backsliding requirements where EPA relaxes a NAAQS. Here, if EPA were to replace the annual and/or 24-hour standard with a short term 1-hour standard, EPA would need to address the section 172(e) anti-backsliding provision of the CAA and determine whether it applies on its face or by analogy, and what provisions would be appropriate to provide for transition to the new standard. States would need to insure that the health protection provided under the existing SO_2 NAAQS continues to be achieved as well as maintained as states begin to implement a revised NAAQS. This means that states would be directed to continue implementing attainment and maintenance SIPs associated with the existing SO_2 NAAQS until such time as they are subsumed by any new planning and control requirements associated with a revised NAAQS.

Whether or not section 172(e) directly applies to EPA's final action on the SO_2 NAAQS, EPA has previously looked to other provisions of the CAA to determine how to address anti-backsliding. The CAA contains a number of provisions that indicate Congress's intent to not allow provisions from implementation plans to be altered or removed if the plan revision would jeopardize the air quality protection being provided by the existing plan when EPA revises a NAAQS to make it more stringent. For example, section 110(l) provides that EPA may not approve a SIP revision if it interferes with any applicable requirement concerning attainment and RFP, or any other applicable requirement under the CAA. In addition, section 193 of the CAA prohibits the modification of a control, or a control requirement, in effect or required to be adopted as of November 15, 1990 (*i.e.,* prior to the promulgation of the Clean Air Act Amendments of 1990), unless such a modification would

[42] Criteria pollutants are those pollutants for which EPA has established a NAAQS under section 109 of the CAA.

[43] Transportation conformity is required under CAA section 176(c) (42 U.S.C. 7506(c) to ensure that federally supported highway and transit project activities are consistent with (''conform to'') the purpose of the SIP. Transportation conformity applies to areas that are designated nonattainment, and those areas redesignated to attainment after 1990 (''maintenance areas'' with plans developed under CAA section 175A) for transportation-related criteria pollutants. Due to the relatively small amounts of sulfur in gasoline and on-road diesel fuel, transportation conformity does not apply to the SO_2 NAAQS. 40 CFR 93.102(b)(1).

ensure equivalent or greater emissions reductions. Further, section 172(e) of the CAA specifies that if EPA revises a NAAQS to make it less stringent than a previous NAAQS, control obligations that apply in nonattainment area SIPs may not be relaxed, and adopting those controls that have not yet been adopted as needed may not be avoided. The intent of Congress, concerning the aforementioned sections of the CAA, was confirmed in a recent DC Circuit Court opinion on the Phase I ozone implementation rule. See *South Coast Air Quality Management Dist.* v. *EPA,* 472 F.3d 882 (DC Cir. 2006).

To ensure that the antibacksliding provisions and principles of section 172(e) are met and applied if EPA revokes the current standards, EPA is proposing that the current SO_2 NAAQS would remain in effect for one year following the effective date of the initial designations under section 107(d)(1) for the revised SO_2 NAAQS before the current NAAQS are revoked in most attainment areas. However, any existing SIP provisions under CAA sections 110, 191 and 192 associated with the existing annual and 24-hour SO_2 NAAQS would remain in effect, including all currently implemented planning and emissions control obligations, including both those in the state's SIP and that have been promulgated by EPA in FIPs. This would ensure that both the new nonattainment NSR requirements and the general conformity requirements for a revised standard are in place so that there will be no gap in the public health protections provided by these two programs. It will also insure that all nonattainment areas under the current NAAQS and all areas for which SIP calls have been issued would continue to be protected by currently required control measures.

EPA is also proposing that the existing NAAQS remain in place for any current nonattainment area, or any area for which a state has not fulfilled the requirements of a SIP call, until the affected area submits, and EPA approves, a SIP with an attainment demonstration which fully addresses the attainment requirements of the revised SO_2 NAAQS. This, in combination with the CAA mechanisms provided in sections 110(l), 193, and 172(e) will help to ensure that continued progress is made toward timely attainment of the SO_2 NAAQS. Also, in light of the nature of the proposed revision of the SO_2 NAAQS, the lack of classifications (and mandatory controls associated with such classifications pursuant to the CAA), and the small number of current nonattainment areas, and areas subject to SIP calls, EPA believes (subject to consideration of public comment) that retaining the current standard for a limited period of time until attainment SIPs are approved for the new standard in current nonattainment areas and SIP call areas, and one year after designations in other areas, will adequately serve the anti-backsliding requirements and goals of the CAA.[44]

VII. Communication of Public Health Information

Information on the public health implications of ambient concentrations of criteria pollutants is currently made available primarily through EPA's Air Quality Index (AQI) program. The current Air Quality Index has been in use since its inception in 1999 (64 FR 42530). It provides accurate, timely, and easily understandable information about daily levels of pollution (40 CFR 58.50). The AQI establishes a nationally uniform system of indexing pollution levels for NO_2, carbon monoxide, ozone, particulate matter and sulfur dioxide. The AQI converts pollutant concentrations in a community's air to a number on a scale from 0 to 500. Reported AQI values enable the public to know whether air pollution levels in a particular location are characterized as good (0–50), moderate (51–100), unhealthy for sensitive groups (101–150), unhealthy (151–200), very unhealthy (201–300), or hazardous (300–500). The AQI index value of 100 typically corresponds to the level of the short-term primary NAAQS for each pollutant. An AQI value greater than 100 means that a pollutant is in one of the unhealthy categories (*i.e.,* unhealthy for sensitive groups, unhealthy, very unhealthy, or hazardous) on a given day; an AQI value at or below 100 means that a pollutant concentration is in one of the satisfactory categories (*i.e.,* moderate or good). Decisions about the pollutant concentrations at which to set the various AQI breakpoints, that delineate the various AQI categories, draw directly from the underlying health information that supports the review of the primary NAAQS.

The Agency recognizes the importance of revising the AQI in a timely manner to be consistent with any revisions to the primary NAAQS. Therefore EPA proposes to finalize conforming changes to the AQI, in connection with the Agency's final decision on the SO_2 NAAQS if revisions to the primary standard are promulgated. If EPA promulgates a short-term primary SO_2 NAAQS, conforming changes would include setting the 100 level of the AQI at the same level as the revised primary SO_2 NAAQS. Conforming changes also would include setting the other AQI breakpoints at the lower end of the AQI scale (*i.e.,* AQI values of 50 and 150). EPA does not propose to change breakpoints at the higher end of the AQI scale (from 200 to 500), which would apply to state contingency plans or the Significant Harm Level (40 CFR 51.16), because the information from this review does not inform decisions about breakpoints at those higher levels.

With regard to an AQI value of 50, the breakpoint between the good and moderate categories, historically this value is set at the level of the annual NAAQS, if there is one, or one-half the level of the short-term NAAQS in the absence of an annual NAAQS (63 FR 67823, Dec. 12, 1998). Taking into consideration this practice, EPA is proposing to set the AQI value of 50 to be between 25 and 50 ppb SO_2, 1-hour average. EPA anticipates that figures towards the lower end of this range would be appropriate if the standard is set towards the lower end of the range for the proposed standard (*e.g.* 50 ppb), while figures towards the higher end of the range would be more appropriate for standards set at the higher end of the range (*e.g.,* 100 ppb). If the short-term standard is set at a level above 100 ppb, and (contrary to the proposal) the annual standard is not revoked, then consideration could be given to setting an AQI value of 50 at the level of the annual standard, or 30 ppb. EPA solicits comments on this range for an AQI of 50, and the appropriate basis for selecting an AQI of 50 both within this range and, in light of EPA's solicitation of comment on 1-hour standard levels above 100 ppb, above this range.

With regard to an AQI value of 150, the breakpoint between the unhealthy for sensitive groups and unhealthy categories, historically values between the short-term standard and an AQI value of 500 are set at levels that are approximately equidistant between the AQI values of 100 and 500 unless there is health evidence that suggests a specific level would be appropriate (63 FR 67829, Dec. 12, 1998). For an AQI value of 150, the range of 175 to 200 ppb SO_2, 1-hour average, represents the midpoint between the proposed range for the short-term standard and the level

[44] The areas that are currently designated as nonattainment for the pre-existing SO_2 primary NAAQS are Hayden, AZ; Armstrong, PA; Laurel, MT; Piti, GU; and Tanguisson, GU. The areas that are designated nonattainment for both the primary and the secondary standards are East Helena, MT, Salt Lake Co, MT, Toole Co, UT, and Warren Co, NJ. (See *http://www.epa.gov/oar/oaqps/greenbk/lnc.html*). The Billings/Laurel, MT, area is the only area currently subject to a SIP call.

of an AQI value of 200 (300 ppb SO_2, 1-hour average).

VIII Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under section 3(f)(1) of Executive Order 12866 (58 FR 51735, October 4, 1993), this action is an ''economically significant regulatory action'' because it is likely to have an annual effect on the economy of $100 million or more. Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under EO 12866 and any changes made in response to OMB recommendations have been documented in the docket for this action. In addition, EPA prepared a Regulatory Impact Analysis (RIA) of the potential costs and benefits associated with this action. However, the CAA and judicial decisions make clear that the economic and technical feasibility of attaining the national ambient standards cannot be considered in setting or revising NAAQS, although such factors may be considered in the development of State implementation plans to implement the standards. Accordingly, although an RIA has been prepared, the results of the RIA have not been considered by EPA in developing this proposed rule.

B. Paperwork Reduction Act

The information collection requirements in this proposed rule have been submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* The Information Collection Request (ICR) document prepared by EPA for these proposed revisions to part 58 has been assigned EPA ICR number 2370.01

The information collected under 40 CFR part 53 (*e.g.,* test results, monitoring records, instruction manual, and other associated information) is needed to determine whether a candidate method intended for use in determining attainment of the NAAQS in 40 CFR part 50 will meet the design, performance, and/or comparability requirements for designation as a Federal reference method (FRM) or Federal equivalent method (FEM). We do not expect the number of FRM or FEM determinations to increase over the number that is currently used to estimate burden associated with SO_2 FRM/FEM determinations provided in the current ICR for 40 CFR part 53 (EPA ICR numbers 2370.01). As such, no change in the burden estimate for 40 CFR part 53 has been made as part of this rulemaking.

The information collected and reported under 40 CFR part 58 is needed to determine compliance with the NAAQS, to characterize air quality and associated health impacts, to develop emissions control strategies, and to measure progress for the air pollution program. The proposed amendments would revise the technical requirements for SO_2 monitoring sites, require the siting and operation of additional SO_2 ambient air monitors, and the reporting of the collected ambient SO_2 monitoring data to EPA's Air Quality System (AQS). The annual average reporting burden for the collection under 40 CFR part 58 (averaged over the first 3 years of this ICR) is $13,863,950. Burden is defined at 5 CFR 1320.3(b). State, local, and tribal entities are eligible for State assistance grants provided by the Federal government under the CAA which can be used for monitors and related activities.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

To comment on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, EPA has established a public docket for this rule, which includes this ICR, under Docket ID number EPA–HQ–OAR–2007–0352. Submit any comments related to the ICR to EPA and OMB. See **ADDRESSES** section at the beginning of this notice for where to submit comments to EPA. Send comments to OMB at the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW, Washington, DC 20503, Attention: Desk Office for EPA. Since OMB is required to make a decision concerning the ICR between 30 and 60 days after December 8, 2009, a comment to OMB is best assured of having its full effect if OMB receives it by January 7, 2010. The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of this rule on small entities, small entity is defined as: (1) A small business that is a small industrial entity as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of this proposed rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This proposed rule will not impose any requirements on small entities. Rather, this rule establishes national standards for allowable concentrations of SO_2 in ambient air as required by section 109 of the CAA. *American Trucking Ass'ns v. EPA,* 175 F. 3d 1027, 1044–45 (DC Cir. 1999) (NAAQS do not have significant impacts upon small entities because NAAQS themselves impose no regulations upon small entities). Similarly, the proposed amendments to 40 CFR Part 58 address the requirements for States to collect information and report compliance with the NAAQS and will not impose any requirements on small entities. We continue to be interested in the potential impacts of the proposed rule on small entities and welcome comments on issues related to such impacts.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Unless otherwise prohibited by law, under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. Before promulgating an EPA rule for which a written statement is required under section 202, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of

regulatory alternatives and to adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

This action is not subject to the requirements of sections 202 and 205 of the UMRA. EPA has determined that this proposed rule does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year. The revisions to the SO_2 NAAQS impose no enforceable duty on any State, local or Tribal governments or the private sector. The expected costs associated with the monitoring requirements are described in EPA's ICR document, but those costs are not expected to exceed $100 million in the aggregate for any year. Furthermore, as indicated previously, in setting a NAAQS, EPA cannot consider the economic or technological feasibility of attaining ambient air quality standards. Because the CAA prohibits EPA from considering the types of estimates and assessments described in section 202 when setting the NAAQS, the UMRA does not require EPA to prepare a written statement under section 202 for the revisions to the SO_2 NAAQS.

With regard to implementation guidance, the CAA imposes the obligation for States to submit SIPs to implement the SO_2 NAAQS. In this proposed rule, EPA is merely providing an interpretation of those requirements. However, even if this rule did establish an independent obligation for States to submit SIPs, it is questionable whether an obligation to submit a SIP revision would constitute a Federal mandate in any case. The obligation for a State to submit a SIP that arises out of section 110 and section 191 of the CAA is not legally enforceable by a court of law, and at most is a condition for continued receipt of highway funds. Therefore, it is possible to view an action requiring such a submittal as not creating any enforceable duty within the meaning of U.S.C. 658 for purposes of the UMRA. Even if it did, the duty could be viewed as falling within the exception for a condition of Federal assistance under U.S.C. 658.

EPA has determined that this proposed rule contains no regulatory requirements that might significantly or uniquely affect small governments because it imposes no enforceable duty on any small governments. Therefore, this rule is not subject to the requirements of section 203 of the UMRA.

E. Executive Order 13132: Federalism

Executive Order 13132, entitled ''Federalism'' (64 FR 43255; August 10, 1999), requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

This proposed rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. The rule does not alter the relationship between the Federal government and the States regarding the establishment and implementation of air quality improvement programs as codified in the CAA. Under section 109 of the CAA, EPA is mandated to establish NAAQS; however, CAA section 116 preserves the rights of States to establish more stringent requirements if deemed necessary by a State. Furthermore, this rule does not impact CAA section 107 which establishes that the States have primary responsibility for implementation of the NAAQS. Finally, as noted in section E (above) on UMRA, this rule does not impose significant costs on State, local, or tribal governments or the private sector. Thus, Executive Order 13132 does not apply to this rule.

However, EPA recognizes that States will have a substantial interest in this rule and any corresponding revisions to associated air quality surveillance requirements, 40 CFR part 58. Therefore, in the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and State and local governments, EPA specifically solicits comment on this proposed rule from State and local officials.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' This proposed rule does not have tribal implications, as specified in Executive Order 13175. It does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and tribes. The rule does not alter the relationship between the Federal government and tribes as established in the CAA and the TAR. Under section 109 of the CAA, EPA is mandated to establish NAAQS; however, this rule does not infringe existing tribal authorities to regulate air quality under their own programs or under programs submitted to EPA for approval. Furthermore, this rule does not affect the flexibility afforded to tribes in seeking to implement CAA programs consistent with the TAR, nor does it impose any new obligation on tribes to adopt or implement any NAAQS. Finally, as noted in section E (above) on UMRA, this rule does not impose significant costs on tribal governments. Thus, Executive Order 13175 does not apply to this rule. However, EPA recognizes that tribes may be interested in this rule and any corresponding revisions to associated air quality surveillance requirements. Therefore, in the spirit of Executive Order 13175, and consistent with EPA policy to promote communications between EPA and tribes, EPA specifically solicits additional comment on this proposed rule from tribal officials.

G. Executive Order 13045: Protection of Children From Environmental Health & Safety Risks

This action is subject to Executive Order (62 FR 19885, April 23, 1997) because it is an economically significant regulatory action as defined by Executive Order 12866, and we believe that the environmental health risk addressed by this action has a disproportionate effect on children. The proposed rule will establish uniform national ambient air quality standards for SO_2; these standards are designed to protect public health with an adequate margin of safety, as required by CAA section 109. The protection offered by these standards may be especially important for asthmatics, including asthmatic children, because respiratory effects in asthmatics are among the most sensitive health endpoints for SO_2 exposure. Because asthmatic children are considered a sensitive population, we have evaluated the potential health effects of exposure to SO_2 pollution among asthmatic children. These effects and the size of the population affected are discussed in chapters 3 and 4 of the ISA; chapters 3, 4, 7, 8, 9 of the REA, and sections II.A through II.E of this preamble.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution or Use

This rule is not a ''significant energy action'' as defined in Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355; May 22, 2001) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The purpose of this rule is to establish revised NAAQS for SO_2. The rule does not prescribe specific control strategies by which these ambient standards will be met. Such strategies will be developed by States on a case-by-case basis, and EPA cannot predict whether the control options selected by States will include regulations on energy suppliers, distributors, or users. Thus, EPA concludes that this rule is not likely to have any adverse energy effects.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 27) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This proposed rulemaking involves technical standards with regard to ambient monitoring of SO_2. The use of this voluntary consensus standard would be impractical because the analysis method does not provide for the method detection limits necessary to adequately characterize ambient SO_2 concentrations for the purpose of determining compliance with the proposed revisions to the SO_2 NAAQS.

EPA welcomes comments on this aspect of the proposed rule, and specifically invites the public to identify potentially applicable voluntary consensus standards and to explain why such standards should be used in the regulation.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629; Feb. 16, 1994) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA has determined that this proposed rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it increases the level of environmental protection for all affected populations without having any disproportionately high and adverse human health effects on any population, including any minority or low-income population. The proposed rule will establish uniform national standards for SO_2 in ambient air. EPA solicits comment on environmental justice issues related to the proposed revision of the SO_2 NAAQS.

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List of Subjects

40 CFR Part 50

Environmental protection, Air pollution control, Carbon monoxide, Lead, Nitrogen dioxide, Ozone, Particulate matter, Sulfur oxides.

40 CFR Part 53

Environmental protection, Administrative practice and procedure, Air pollution control, Intergovernmental relations, Reporting and recordkeeping requirements.

40 CFR Part 58

Environmental protection, Administrative practice and procedure, Air pollution control, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: November 16, 2009.

Lisa P. Jackson,

Administrator.

For the reasons stated in the preamble, title 40, chapter I of the Code of Federal Regulations is proposed to be amended as follows:

PART 50—NATIONAL PRIMARY AND SECONDARY AMBIENT AIR QUALITY STANDARDS

1. The authority citation for part 50 continues to read as follows:

Authority: 42 U.S.C. 7401, *et seq.*

2. Section 50.4 is amended by adding paragraph (e) to read as follows:

§ 50.4 National primary ambient air quality standards for sulfur oxides (sulfur dioxide).

* * * * *

(e) The standards set forth in this section will remain applicable to all areas notwithstanding the promulgation of SO_2 national ambient air quality standards (NAAQS) in § 50.17. The SO_2 NAAQS set forth in this section will no longer apply to an area one year after the effective date of the designation of that area, pursuant to section 107 of the Clean Air Act, for the SO_2 NAAQS set forth in § 50.17; except that for areas designated nonattainment for the SO_2 NAAQS set forth in this section as of the effective date of § 50.17, and areas not meeting the requirements of a SIP call with respect to requirements for the SO_2 NAAQS set forth in this section, the SO_2 NAAQS set forth in this section will apply until that area submits, pursuant to section 191 of the Clean Air Act, and EPA approves, an implementation plan providing for attainment of the SO_2 NAAQS set forth in § 50.17.

3. Section 50.14 is amended by revising paragraph (c)(2)(vi) to read as follows:

§ 50.14 Treatment of air quality monitoring data influenced by exceptional events.

* * * * *

(c) * * *

(2) * * *

(vi) When EPA sets a NAAQS for a new pollutant or revises the NAAQS for an existing pollutant, it may revise or set a new schedule for flagging exceptional event data, providing initial data descriptions and providing detailed data documentation in AQS for the initial designations of areas for those NAAQS. Table 1 provides the schedule for submission of flags with initial descriptions in AQS and detailed documentation. These schedules shall apply for those data which will or may influence the initial designation of areas for those NAAQS. EPA anticipates revising Table 1 as necessary to accommodate revised data submission schedules for new or revised NAAQS.

TABLE 1—SCHEDULE OR EXCEPTIONAL EVENT FLAGGING AND DOCUMENTATION SUBMISSION FOR DATA TO BE USED IN DESIGNATIONS DECISIONS FOR NEW OR REVISED NAAQS

NAAQS pollutant/ standard/(level)/ promulgation date	Air quality data collected for calendar year	Event flagging and initial description deadline	Detailed documentation submission deadline
$PM_{2.5}$/24-Hr Standard (35 μg/m^3) Promulgated October 17, 2006.	2004–2006	October 1, 2007 [a]	April 15, 2008 [a].
Ozone/8-Hr Standard (0.075 ppm) Promulgated March 12, 2008.	2005–2007	June 18, 2009 [a]	June 18, 2009 [a].
	2008	June 18, 2009 [a]	June 18, 2009 [a].

TABLE 1—SCHEDULE OR EXCEPTIONAL EVENT FLAGGING AND DOCUMENTATION SUBMISSION FOR DATA TO BE USED IN DESIGNATIONS DECISIONS FOR NEW OR REVISED NAAQS—Continued

NAAQS pollutant/ standard/(level)/ promulgation date	Air quality data collected for calendar year	Event flagging and initial description deadline	Detailed documentation submission deadline
	2009	60 Days after the end of the calendar quarter in which the event occurred or February 5, 2010, whichever date occurs first [b].	60 Days after the end of the calendar quarter in which the event occurred or February 5, 2010, whichever date occurs first [b].
NO_2/1-Hour Standard (80–100 PPB, final level TBD).	2008	July 1, 2010 [a]	January 22, 2011 [a].
	2009	July 1, 2010 [a]	January 22, 2011 [a].
	2010	April 1, 2011 [a]	July 1, 2011 [a].
SO_2/1-Hour Standard (50–100 PPB, final level TBD).	2008	October 1, 2010 [b]	June 1, 2011 [b].
	2009	October 1, 2010 [b]	June 1, 2011 [b].
	2010	June 1, 2011 [b]	June 1, 2011 [b].
	2011	60 Days after the end of the calendar quarter in which the event occurred or March 31, 2011, whichever date occurs first [b].	60 Days after the end of the calendar quarter in which the event occurred or March 31, 2011, whichever date occurs first [b].

[a] These dates are unchanged from those published in the original rulemaking, or are being proposed elsewhere and are shown in this table for informational purposes—the Agency is not opening these dates for comment under this rulemaking.

[b] Indicates change from general schedule in 40 CFR 50.14.

Note: EPA notes that the table of revised deadlines only applies to data EPA will use to establish the final initial designations for new or revised NAAQS. The general schedule applies for all other purposes, most notably, for data used by EPA for redesignations to attainment.

* * * * *

4. A new 50.17 is added to read as follows:

§ 50.17 National primary ambient air quality standards for sulfur oxides (sulfur dioxide).

(a) The level of the national primary 1-hour annual ambient air quality standard for oxides of sulfur is (50–100) parts per billion (ppb, which is 1 part in 1,000,000,000), measured in the ambient air as sulfur dioxide (SO_2).

(b) The 1-hour primary standard is met when the three-year average of the annual (99th percentile)(fourth highest) of the daily maximum 1-hour average concentrations is less than or equal to (50–100) ppb, as determined in accordance with Appendix T of this part.

5. Add Appendix A–1 to Part 50 to read as follows:

Appendix A–1 to Part 50—Reference Measurement Principle and Calibration Procedure for the Measurement of Sulfur Dioxide in the Atmosphere (Ultraviolet Fluorescence Method)

1.0 *Applicability.*

1.1 This ultraviolet fluorescence (UVF) method provides a measurement of the concentration of sulfur dioxide (SO_2) in ambient air for determining compliance with the national primary and secondary ambient air quality standards for sulfur oxides (sulfur dioxide) as specified in § 50.4 and § 50.5 of this chapter. The method is applicable to the measurement of ambient SO_2 concentrations using continuous (real-time) sampling. Additional quality assurance procedures and guidance are provided in part 58, appendix A, of this chapter and in Reference 3.

2.0 *Principle.*

2.1 This reference method is based on automated measurement of the intensity of the characteristic fluorescence released by SO_2 in an ambient air sample contained in a measurement cell of an analyzer when the air sample is irradiated by ultraviolet (UV) light passed through the cell. The fluorescent light released by the SO_2 is also in the ultraviolet region, but at longer wavelengths than the excitation light. Typically, optimum instrumental measurement of SO_2 concentrations is obtained with an excitation wavelength in a band between approximately 190 to 230 nm, and measurement of the SO_2 fluorescence in a broad band around 320 nm, but these wavelengths are not necessarily constraints of this reference method. Generally, the measurement system (analyzer) also requires means to reduce the effects of aromatic hydrocarbon species, and possibly other compounds, in the air sample to control measurement interferences from these compounds, which may be present in the ambient air. References 1 and 2 describe UVF method.

2.2. The measurement system is calibrated by referencing the instrumental fluorescence measurements to SO_2 standard concentrations traceable to a National Institute of Science and Technology (NIST) primary standard for SO_2 (see Calibration Procedure below).

2.3. An analyzer implementing this measurement principle is shown schematically in Figure 1. Designs should include a measurement cell, a UV light source of appropriate wavelength, a UV detector system with appropriate wave length sensitivity, a pump and flow control system for sampling the ambient air and moving it into the measurement cell, sample air conditioning components as necessary to minimize measurement interferences, suitable control and measurement processing capability, and other apparatus as may be necessary. The analyzer must be designed to provide accurate, repeatable, and continuous measurements of SO_2 concentrations in ambient air, with measurement performance as specified in subpart B of part 53 of this chapter.

2.4. Sampling considerations: The use of a particle filter on the sample inlet line of a UVF SO_2 analyzer is required to prevent interference, malfunction, or damage due to particles in the sampled air.

3.0 *Interferences.*

3.1 The effects of the principal potential interferences may need to be mitigated to meet the interference equivalent requirements of part 53 of this chapter. Polynuclear aromatic (PNA) hydrocarbons such as xylene and naphthalene can fluoresce and act as strong positive interferences. These gases can be removed by using a permeation type scrubber (hydrocarbon ''kicker''). Nitrogen oxide (NO) in high concentrations can also fluoresce and cause positive interference. Optical filtering can be employed to improve the rejection of interference from high NO. Ozone can absorb UV light given off by the SO_2 molecule and cause a measurement offset. This effect can be reduced by minimizing the measurement path length between the area where SO_2 fluorescence occurs and the photomultiplier tube detector (*e.g.* <5 cm). A hydrocarbon scrubber, optical filter and appropriate distancing of the measurement path length may be required method components to reduce interference.

4.0 *Calibration Procedure.* Atmospheres containing accurately known concentrations of sulfur dioxide are prepared using a compressed gas transfer standard diluted with accurately metered clean air flow rates.

4.1 Apparatus: Figure 2 shows a typical generic system suitable for diluting a SO_2 gas cylinder concentration standard with clean air through a mixing chamber to produce the desired calibration concentration standards.

A valve may be used to conveniently divert the SO_2 from the sampling manifold to provide clean zero air at the output manifold for zero adjustment. The system may be made up using common laboratory components, or it may be a commercially manufactured system. In either case, the principle components are as follows:

4.1.1 Air and standard gas flow controllers, capable of maintaining constant gas flow rates to within ± 2 percent.

4.1.2 Air and standard gas flow meters, capable of measuring and monitoring air or N_2 (standard gas) flow rates to within ± 2 percent and properly calibrated to a NIST-traceable standard.

4.1.3 Mixing chamber, of an inert material such as glass and of proper design to provide thorough mixing of pollutant gas and diluent air streams.

4.1.4 Sampling manifold, constructed of glass, polytetrafluoroethylene (PTFE Teflon™), or other suitably inert material and of sufficient diameter to insure a minimum pressure drop at the analyzer connection, with a vent designed to insure a minimum over-pressure (relative to ambient air pressure) at the analyzer connection and to prevent ambient air from entering the manifold.

4.1.5 Standard gas pressure regulator, of clean stainless steel with a stainless steel diaphragm, suitable for use with a high pressure SO_2 gas cylinder.

4.1.6 Reagents.

4.1.6.1 SO_2 gas transfer standard, in N_2, with the concentration traceable to a NIST Standard Reference Material (SRM) such as SRM 1693a (50 µmole/mole) or SRM 1694a (100 µmole/mole) Since UVF analyzers may be sensitive to O_2-to-N_2 ratios, it is important that the SO_2 standard concentration be sufficiently high (50 to 100 ppm) such that the O_2 content in the diluent air is not significantly changed by the added standard gas.

4.1.6.2 Clean zero air, free of contaminants that could cause a detectable response or a change in sensitivity of the analyzer. Since ultraviolet fluorescence analyzers may be sensitive to aromatic hydrocarbons and O_2-to-N_2 ratios, it is important that the clean zero air contains less than 0.1 ppm aromatic hydrocarbons and O_2 and N_2 percentages approximately the same as in ambient air. A procedure for generating zero air is given in reference 1.

4.2 Procedure

4.2.1 Obtain a suitable calibration apparatus, such as the one shown schematically in Figure 1, and verify that all materials in contact with the pollutant are of glass, Teflon™, or other suitably inert material and completely clean.

4.2.2 Purge the SO_2 standard gas lines and pressure regulator to remove any residual air.

4.2.3 Ensure that there are no leaks in the system and that the flow measuring devices are properly and accurately calibrated under the conditions of use against a reliable volume or flow rate standard such as a soap-bubble meter or a wet-test meter traceable to a NIST standard. All volumetric flow rates should be corrected to the same reference temperature and pressure by using the formula below:

$$F_c = F_m \frac{298.15 P_m}{760\ (T_m + 273.15)}$$

Where:

F_c = corrected flow rate (L/min at 25° C and 760 mm Hg),

F_m = measured flow rate, (at temperature, T_m and pressure, P_m),

P_m = measured pressure in mm Hg, (absolute), and

T_m = measured temperature in degrees Celsius.

4.2.4 Allow the SO_2 analyzer under calibration to sample zero air until a stable response is obtained, then make the proper zero adjustment.

4.2.5 Adjust the airflow to provide an SO_2 concentration of approximately 80 percent of the upper measurement range limit of the SO_2 instrument and verify that the total air flow of the calibration system exceeds the demand of all analyzers sampling from the output manifold (with the excess vented).

4.2.6 Calculate the actual SO_2 calibration concentration standard as:

$$[SO_2] = C \frac{F_p}{F_t}$$

Where:

C = the concentration of the SO_2 gas standard

F_p = the flow rate of SO_2 gas standard

F_t = the total air flow rate of pollutant and diluent gases

4.2.7 When the analyzer response has stabilized, adjust the SO_2 span control to obtain the desired response equivalent to the calculated standard concentration. If substantial adjustment of the span control is needed, it may be necessary to re-check the zero and span adjustments by repeating steps 4.2.4 through 4.2.7 until no further adjustments are needed.

4.2.8 Adjust the flow rate(s) to provide several other SO_2 calibration concentrations over the analyzer's measurement range. At least five different concentrations evenly spaced throughout the analyzer's range are suggested.

4.2.9 Plot the analyzer response (vertical or Y-axis) versus SO_2 concentration (horizontal or X-axis). Compute the linear regression slope and intercept and plot the regression line to verify that no point deviates from this line by more than 2 percent of the maximum concentration tested.

Note: Additional information on calibration and pollutant standards is provided in Section 12 of Reference 3.

5.0 *Frequency of calibration.*

The frequency of calibration, as well as the number of points necessary to establish the calibration curve and the frequency of other performance checking will vary by analyzer; however, the minimum frequency, acceptance criteria, and subsequent actions are specified in Reference 3, Appendix D: Measurement Quality Objectives and Validation Template for SO_2 (page 9 of 30). The user's quality control program should provide guidelines for initial establishment of these variables and for subsequent alteration as operational experience is accumulated. Manufacturers of analyzers should include in their instruction/operation manuals information and guidance as to these variables and on other matters of operation, calibration, routine maintenance, and quality control.

6.0 *References for SO_2 Method.*

1. H. Okabe, P.L. Splitstone, and J.J. Ball, ''Ambient and Source SO_2 Detector Based on a Fluorescence Method'', *Journal of the Air Control Pollution Association*, vol. 23, p. 514–516 (1973).
2. F.P. Schwarz, H. Okabe, and J.K. Whittaker, ''Fluorescence Detection of Sulfur Dioxide in Air at the Parts per Billion Level,'' *Analytical Chemistry,* vol. 46, pp. 1024–1028 (1974).
3. *QA Handbook for Air Pollution Measurement Systems—Volume II. Ambient Air Quality Monitoring Programs. U. S. EPA.* EPA–454/B–08–003 (2008). (Available at *http://www.epa.gov/ttn/amtic/qabook.html.*)

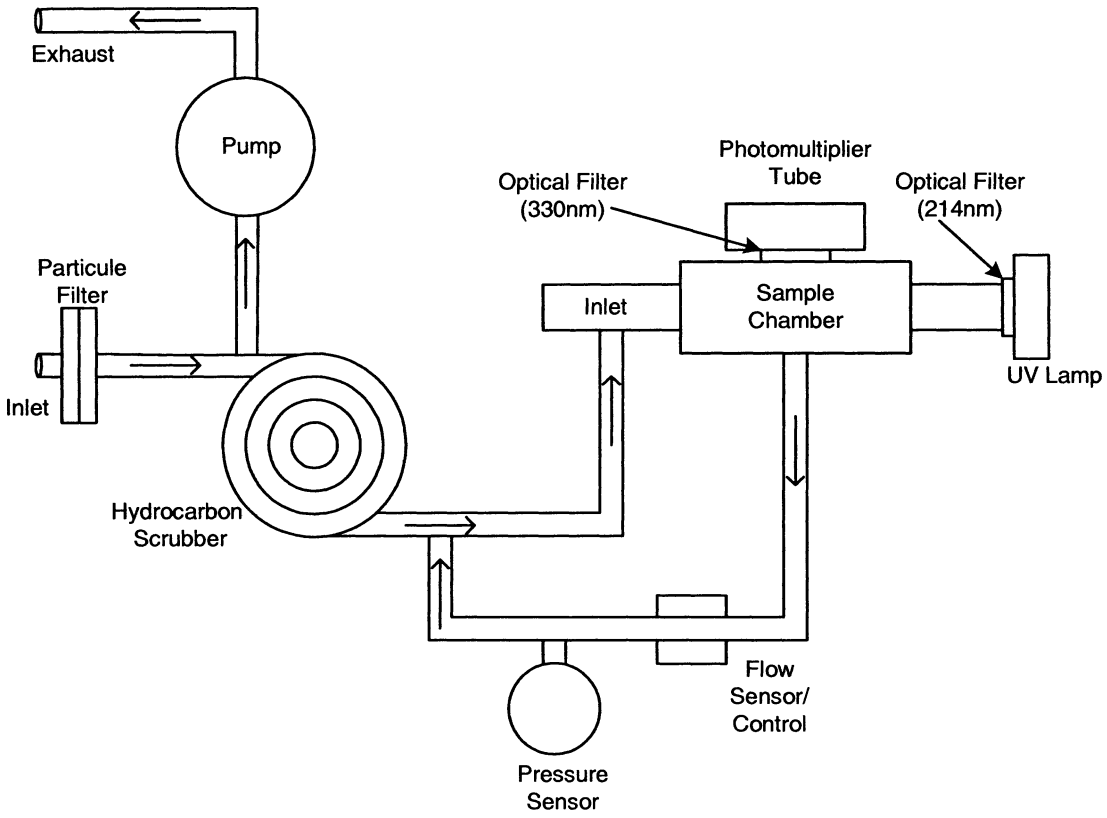

Figure 1. UVF SO_2 analyzer schematic diagram.

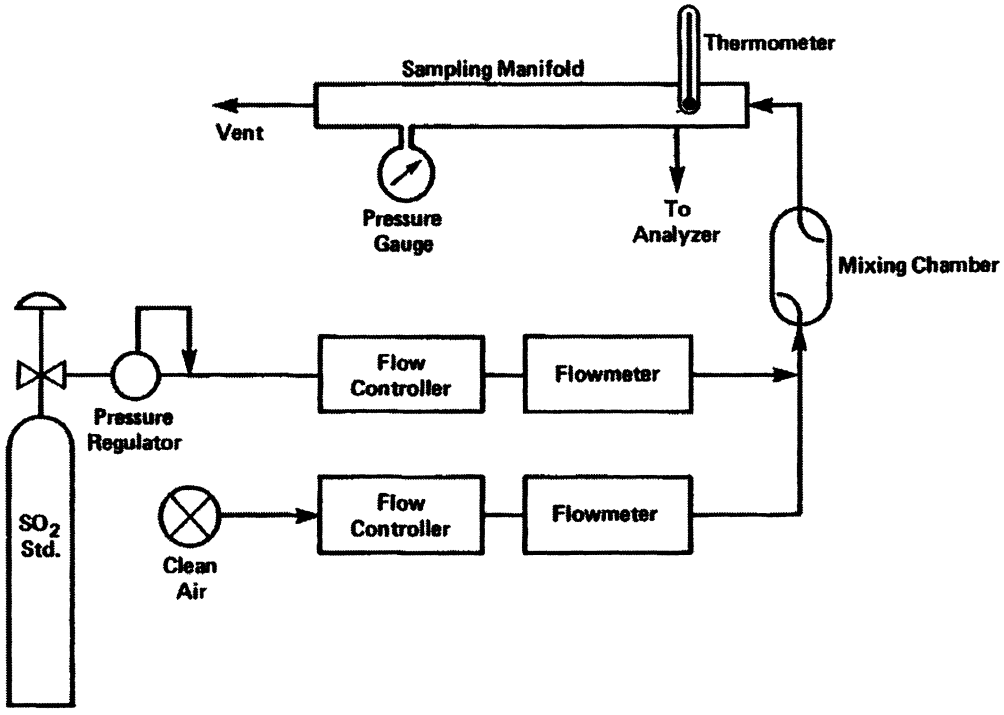

Figure 2. Calibration system using a compressed gas standard.

6. Appendix A to Part 50 is redesignated as Appendix A–2 to Part 50.

7. Appendix T to Part 50 is added to read as follows:

Option 1 for Appendix T to Part 50

Appendix T to Part 50—Interpretation of the Primary National Ambient Air Quality Standards for Oxides of Sulfur (Sulfur Dioxide) [1-hour primary standard based on the 4th highest daily maximum value form]

1. General.

(a) This appendix explains the data handling conventions and computations necessary for determining when the primary national ambient air quality standards for Oxides of Sulfur as measured by Sulfur Dioxide (''SO_2 NAAQS'') specified in § 50.4 are met. Sulfur Dioxide (SO_2) is measured in the ambient air by a Federal reference method (FRM) based on appendix A to this part or by a Federal equivalent method (FEM) designated in accordance with part 53 of this chapter. Data handling and computation procedures to be used in making comparisons between reported SO_2 concentrations and the levels of the SO_2 NAAQS are specified in the following sections.

(b) Decisions to exclude, retain, or make adjustments to the data affected by exceptional events, including natural events, are made according to the requirements and process deadlines specified in §§ 50.1, 50.14 and 51.930 of this chapter.

(c) The terms used in this appendix are defined as follows:

Annual 4th highest daily maximum 1-hour value refers to the 4th highest daily 1-hour maximum value at a site in a particular year.

Daily maximum 1-hour values for SO_2 refers to the maximum 1-hour SO_2 concentration values measured from midnight to midnight (local standard time) that are used in NAAQS computations.

Design values are the metrics (*i.e.,* statistics) that are compared to the NAAQS levels to determine compliance, calculated as specified in section 5 of this appendix. The design value for the primary NAAQS is the 3-year average of annual 4th highest daily maximum 1-hour values for a monitoring site (referred to as the ''1-hour primary standard design value'').

Quarter refers to a calendar quarter.

Year refers to a calendar year.

2. Requirements for Data Used for Comparisons With the SO_2 NAAQS and Data Reporting Considerations.

(a) All valid FRM/FEM SO_2 hourly data required to be submitted to EPA's Air Quality System (AQS), or otherwise available to EPA, meeting the requirements of part 58 of this chapter including appendices A, C, and E shall be used in design value calculations. Multi-hour average concentration values collected by wet chemistry methods shall not be used.

(b) When two or more SO_2 monitors are operated at a site, the state may in advance designate one of them as the primary monitor. If the state has not made this designation in advance, the Administrator will make the designation, either in advance or retrospectively. Design values will be developed using only the data from the primary monitor, if this results in a valid design value. If data from the primary monitor do not allow the development of a valid design value, data solely from the other monitor(s) will be used in turn to develop a valid design value, if this results in a valid design value. If there are three or more monitors, the order for such comparison of the other monitors will be determined by the Administrator. The Administrator may combine data from different monitors in different years for the purpose of developing a valid 1-hour primary standard design value, if a valid design value cannot be developed solely with the data from a single monitor. However, data from two or more monitors in the same year at the same site will not be combined in an attempt to meet data completeness requirements, except if one monitor has physically replaced another instrument permanently, in which case the two instruments will be considered to be the same monitor, or if the state has switched the designation of the primary monitor from one instrument to another during the year.

(c) Hourly SO_2 measurement data shall be reported to AQS in units of parts per billion (ppb), to at most one place after the decimal, with additional digits to the right being truncated with no further rounding.

3. Comparisons with the 1-hour Primary SO_2 NAAQS.

(a) The 1-hour primary SO_2 NAAQS is met at a site when the valid 1-hour primary standard design value is less than or equal to [50–150] parts per billion (ppb).

(b) An SO_2 1-hour primary standard design value is valid if it encompasses three consecutive calendar years of complete data. A year meets data completeness requirements when all 4 quarters are complete. A quarter is complete when at least 75 percent of the sampling days for each quarter have complete data. A sampling day has complete data if 75 percent of the hourly concentration values are reported.

(c) In the case of one, two, or three years that do not meet the completeness requirements of section 3(b) of this appendix and thus would normally not be usable for the calculation of a valid 3-year 1-hour primary standard design value, the 3-year 1-hour primary standard design value shall nevertheless be considered valid if either of the following conditions is true:

(i) If there are at least four days in each of the 3 years that have at least one reported hourly value, and the resulting 3-year 1-hour primary standard design value exceeds the 1-hour primary NAAQS. In this situation, more complete data capture could not possibly have resulted in a design value below the 1-hour primary NAAQS:

(ii)(A) A 1-hour primary standard design value that is below the level of the NAAQS can be validated if the substitution test in section 3(c)(ii)(B) results in a ''test design value'' that is below the level of the NAAQS. The test substitutes actual ''high'' reported daily maximum 1-hour values from the same site at about the same time of the year (specifically, in the calendar quarter) for unknown hourly values that were not successfully measured. Note that the test is merely diagnostic in nature, intended to confirm that there is a very high likelihood that the original design value (the one with less than 75 percent data capture of hours by day and of days by quarter) reflects the true under-NAAQS-level status for that 3-year period; the result of this data substitution test (the ''test design value,'' as defined in section 3(c)(ii)(B)) is not considered the actual design value. For this test, substitution is permitted only if there are at least 200 days across the three matching quarters of the three years under consideration (which is about 75 percent of all possible daily values in those three quarters) for which 75 percent of the hours in the day have reported concentrations. However, maximum 1-hour values from days with less than 75 percent of the hours reported shall also be considered in identifying the high value to be used for substitution.

(B) The substitution test is as follows: Data substitution will be performed in all quarter periods that have less than 75 percent data capture but at least 50 percent data capture; if any quarter has less than 50 percent data capture, then this substitution test cannot be used. Identify for each quarter (*e.g.,* January–March) the highest reported daily maximum 1-hour value for that quarter, looking across those three months of all three years under consideration. All daily maximum 1-hour values from all days in the quarter period shall be considered when identifying this highest value, including days with less than 75 percent data capture. If after substituting the highest reported daily maximum 1-hour value for a quarter for as much of the missing daily data in the matching deficient quarter(s) as is needed to make them 100 percent complete, the procedure in section 5 yields a recalculated 3-year 1-hour standard ''test design value'' below the level of the standard, then the 1-hour primary standard design value is deemed to have passed the diagnostic test and is valid, and the level of the standard is deemed to have been met in that 3-year period. As noted in section 3(c)(i), in such a case, the 3-year design value based on the data actually reported, not the ''test design value,'' shall be used as the valid design value.

(d) A 1-hour primary standard design value based on data that do not meet the completeness criteria stated in 3(b) and also do not satisfy section 3(c), may also be considered valid with the approval of, or at the initiative of, the Administrator, who may consider factors such as monitoring site closures/moves, monitoring diligence, the consistency and levels of the valid concentration measurements that are available, and nearby concentrations in determining whether to use such data.

(e) The procedures for calculating the 1-hour primary standard design values are given in section 5 of this appendix.

4. Rounding Conventions for the 1-hour Primary SO_2 NAAQS.

(a) Hourly SO_2 measurement data shall be reported to AQS in units of parts per billion (ppb), to at most one place after the decimal, with additional digits to the right being truncated with no further rounding.

(b) Daily maximum 1-hour values, including the annual 4th highest of those daily values, are not rounded.

(c) The 1-hour primary standard design value is calculated pursuant to section 5 and then rounded to the nearest whole number or 1 ppb (decimals 0.5 and greater are rounded up to the nearest whole number, and any decimal lower than 0.5 is rounded down to the nearest whole number).

5. Calculation Procedures for the 1-hour Primary SO_2 NAAQS.

(a) When the data for a particular site and year meet the data completeness requirements in section 3(b), or if one of the conditions of section 3(c) is met, or if the Administrator exercises the discretionary authority in section 3(d), calculation of the 4th highest daily 1-hour maximum is accomplished as follows.

(i) For each year, select from each day the highest hourly value. All daily maximum 1-hour values from all days in the quarter period shall be considered at this step, including days with less than 75 percent data capture.

(ii) For each year, order these daily values and take the 4th highest.

(iii) The 1-hour primary standard design value for a site is mean of the three annual 4th highest values, rounded according to the conventions in section 4.

Option 2 for Appendix T to Part 50

Appendix T to Part 50—Interpretation of the Primary National Ambient Air Quality Standards for Oxides of Sulfur (Sulfur Dioxide) [1-hour primary standard based on the 99th percentile form]

1. General.

(a) This appendix explains the data handling conventions and computations necessary for determining when the primary national ambient air quality standards for Oxides of Sulfur as measured by Sulfur Dioxide (''SO_2 NAAQS'') specified in § 50.4 are met. Sulfur Dioxide (SO_2) is measured in the ambient air by a Federal reference method (FRM) based on appendix A to this part or by a Federal equivalent method (FEM) designated in accordance with part 53 of this chapter. Data handling and computation procedures to be used in making comparisons between reported SO_2 concentrations and the levels of the SO_2 NAAQS are specified in the following sections.

(b) Decisions to exclude, retain, or make adjustments to the data affected by exceptional events, including natural events, are made according to the requirements and process deadlines specified in §§ 50.1, 50.14 and 51.930 of this chapter.

(c) The terms used in this appendix are defined as follows:

Daily maximum 1-hour values for SO_2 refers to the maximum 1-hour SO_2 concentration values measured from midnight to midnight (local standard time) that are used in NAAQS computations.

Design values are the metrics (*i.e.,* statistics) that are compared to the NAAQS levels to determine compliance, calculated as specified in section 5 of this appendix. The design value for the primary 1-hour NAAQS is the 3-year average of annual 99th percentile daily maximum 1-hour values for a monitoring site (referred to as the ''1-hour primary standard design value'').

99th percentile daily maximum 1-hour value is the value below which nominally 99 percent of all daily maximum 1-hour concentration values fall, using the ranking and selection method specified in section 5 of this appendix.

Quarter refers to a calendar quarter.

Year refers to a calendar year.

2. Requirements for Data Used for Comparisons With the SO_2 NAAQS and Data Reporting Considerations.

(a) All valid FRM/FEM SO_2 hourly data required to be submitted to EPA's Air Quality System (AQS), or otherwise available to EPA, meeting the requirements of part 58 of this chapter including appendices A, C, and E shall be used in design value calculations. Multi-hour average concentration values collected by wet chemistry methods shall not be used.

(b) When two or more SO_2 monitors are operated at a site, the state may in advance designate one of them as the primary monitor. If the state has not made this designation, the Administrator will make the designation, either in advance or retrospectively. Design values will be developed using only the data from the primary monitor, if this results in a valid design value. If data from the primary monitor do not allow the development of a valid design value, data solely from the other monitor(s) will be used in turn to develop a valid design value, if this results in a valid design value. If there are three or more monitors, the order for such comparison of the other monitors will be determined by the Administrator. The Administrator may combine data from different monitors in different years for the purpose of developing a valid 1-hour primary standard design value, if a valid design value cannot be developed solely with the data from a single monitor. However, data from two or more monitors in the same year at the same site will not be combined in an attempt to meet data completeness requirements, except if one monitor has physically replaced another instrument permanently, in which case the two instruments will be considered to be the same monitor, or if the state has switched the designation of the primary monitor from one instrument to another during the year.

(c) Hourly SO_2 measurement data shall be reported to AQS in units of parts per billion (ppb), to at most one place after the decimal, with additional digits to the right being truncated with no further rounding.

3. Comparisons with the 1-hour Primary SO_2 NAAQS.

(a) The 1-hour primary SO_2 NAAQS is met at a site when the valid 1-hour primary standard design value is less than or equal to [50–150] parts per billion (ppb).

(b) An SO_2 1-hour primary standard design value is valid if it encompasses three consecutive calendar years of complete data. A year meets data completeness requirements when all 4 quarters are complete. A quarter is complete when at least 75 percent of the sampling days for each quarter have complete data. A sampling day has complete data if 75 percent of the hourly concentration values are reported.

(c) In the case of one, two, or three years that do not meet the completeness requirements of section 3(b) of this appendix and thus would normally not be useable for the calculation of a valid 3-year 1-hour primary standard design value, the 3-year 1-hour primary standard design value shall nevertheless be considered valid if one of the following conditions is true.

(i) At least 75 percent of the days in each quarter of each of three consecutive years have at least one reported hourly value, and the design value calculated according to the procedures specified in section 5 is above the level of the primary 1-hour standard.

(ii) (A) A 1-hour primary standard design value that is below the level of the NAAQS can be validated if the substitution test in section 3(c)(ii)(B) results in a ''test design value'' that is below the level of the NAAQS. The test substitutes actual ''high'' reported daily maximum 1-hour values from the same site at about the same time of the year (specifically, in the same calendar quarter) for unknown values that were not successfully measured. Note that the test is merely diagnostic in nature, intended to confirm that there is a very high likelihood that the original design value (the one with less than 75 percent data capture of hours by day and of days by quarter) reflects the true under-NAAQS-level status for that 3-year period; the result of this data substitution test (the ''test design value'', as defined in section 3(c)(ii)(B)) is not considered the actual design value. For this test, substitution is permitted only if there are at least 200 days across the three matching quarters of the three years under consideration (which is about 75 percent of all possible daily values in those three quarters) for which 75 percent of the hours in the day have reported concentrations. However, maximum 1-hour values from days with less than 75 percent of the hours reported shall also be considered in identifying the high value to be used for substitution.

(B) The substitution test is as follows: Data substitution will be performed in all quarter periods that have less than 75 percent data capture but at least 50 percent data capture; if any quarter has less than 50 percent data capture then this substitution test cannot be used. Identify for each quarter (*e.g.,* January–March) the highest reported daily maximum 1-hour value for that quarter, looking across those three months of all three years under consideration. All daily maximum 1-hour values from all days in the quarter period shall be considered when identifying this highest value, including days with less than 75 percent data capture. If after substituting the highest reported daily maximum 1-hour value for a quarter for as much of the missing daily data in the matching deficient quarter(s) as is needed to make them 100 percent complete, the procedure in section 5 yields a recalculated 3-year 1-hour standard ''test design value'' below the level of the standard, then the 1-hour primary standard design value is deemed to have passed the diagnostic test and is valid, and the level of

the standard is deemed to have been met in that 3-year period. As noted in section 3(c)(i), in such a case, the 3-year design value based on the data actually reported, not the ''test design value'', shall be used as the valid design value.

(iii) (A) A 1-hour primary standard design value that is above the level of the NAAQS can be validated if the substitution test in section 3(c)(iii)(B) results in a ''test design value'' that is above the level of the NAAQS. The test substitutes actual ''low'' reported daily maximum 1-hour values from the same site at about the same time of the year (specifically, in the same three months of the calendar) for unknown hourly values that were not successfully measured. Note that the test is merely diagnostic in nature, intended to confirm that there is a very high likelihood that the original design value (the one with less than 75 percent data capture of hours by day and of days by quarter) reflects the true above-NAAQS-level status for that 3-year period; the result of this data substitution test (the ''test design value'', as defined in section 3(c)(iii)(B)) is not considered the actual design value. For this test, substitution is permitted only if there are a minimum number of available daily data points from which to identify the low quarter-specific daily maximum 1-hour values, specifically if there are at least 200 days across the three matching quarters of the three years under consideration (which is about 75 percent of all possible daily values in those three quarters) for which 75 percent of the hours in the day have reported concentrations. Only days with at least 75 percent of the hours reported shall be considered in identifying the low value to be used for substitution.

(B) The substitution test is as follows: Data substitution will be performed in all quarter periods that have less than 75 percent data capture. Identify for each quarter (*e.g.,* January–March) the lowest reported daily maximum 1-hour value for that quarter, looking across those three months of all three years under consideration. All daily maximum 1-hour values from all days with at least 75 percent capture in the quarter period shall be considered when identifying this lowest value. If after substituting the lowest reported daily maximum 1-hour value for a quarter for as much of the missing daily data in the matching deficient quarter(s) as is needed to make them 75 percent complete, the procedure in section 5 yields a recalculated 3-year 1-hour standard ''test design value'' above the level of the standard, then the 1-hour primary standard design value is deemed to have passed the diagnostic test and is valid, and the level of the standard is deemed to have been exceeded in that 3-year period. As noted in section 3(c)(i), in such a case, the 3-year design value based on the data actually reported, not the ''test design value'', shall be used as the valid design value.

(d) A 1-hour primary standard design value based on data that do not meet the completeness criteria stated in 3(b) and also do not satisfy section 3(c), may also be considered valid with the approval of, or at the initiative of, the Administrator, who may consider factors such as monitoring site closures/moves, monitoring diligence, the consistency and levels of the valid concentration measurements that are available, and nearby concentrations in determining whether to use such data.

(e) The procedures for calculating the 1-hour primary standard design values are given in section 5 of this appendix.

4. Rounding Conventions for the 1-hour Primary SO_2 NAAQS.

(a) Hourly SO_2 measurement data shall be reported to AQS in units of parts per billion (ppb), to at most one place after the decimal, with additional digits to the right being truncated with no further rounding.

(b) Daily maximum 1-hour values and therefore the annual 4th highest of those daily values are not rounded.

(c) The 1-hour primary standard design value is calculated pursuant to section 5 and then rounded to the nearest whole number or 1 ppb (decimals 0.5 and greater are rounded up to the nearest whole number, and any decimal lower than 0.5 is rounded down to the nearest whole number).

5. Calculation Procedures for the 1-hour Primary SO_2 NAAQS.

(a) *Procedure for identifying annual 99th percentile values.* When the data for a particular site and year meet the data completeness requirements in section 3(b), or if one of the conditions of section 3(c) is met, or if the Administrator exercises the discretionary authority in section 3(d), identification of annual 99th percentile value is accomplished as follows.

(i) The annual 99th percentile value for a year is the higher of the two values resulting from the following two procedures.

(1) Procedure 1. For the year, determine the number of days with at least 75 percent of the hourly values reported.

(A) For the year, from only the days with at least 75 percent of the hourly values reported, select from each day the maximum hourly value.

(B) Sort all these daily maximum hourly values from a particular site and year by descending value. (For example: (x[1], x[2], x[3], * * *, x[n]). In this case, x[1] is the largest number and x[n] is the smallest value.) The 99th percentile is determined from this sorted series of daily values which is ordered from the highest to the lowest number. Using the left column of Table 1, determine the appropriate range (*i.e.,* row) for the annual number of days with valid data for year y (cn_y). The corresponding ''n'' value in the right column identifies the rank of the annual 99th percentile value in the descending sorted list of daily site values for year y. Thus, $P_{0.99,\ y}$ = the nth largest value.

(2) Procedure 2. For the year, determine the number of days with at least one hourly value reported.

(A) For the year, from all the days with at least one hourly value reported, select from each day the maximum hourly value.

(B) Sort all these daily maximum values from a particular site and year by descending value. (For example: (x[1], x[2], x[3], * * *, x[n]). In this case, x[1] is the largest number and x[n] is the smallest value.) The 99th percentile is determined from this sorted series of daily values which is ordered from the highest to the lowest number. Using the left column of Table 1, determine the appropriate range (*i.e.,* row) for the annual number of days with valid data for year y (cn_y). The corresponding ''n'' value in the right column identifies the rank of the annual 99th percentile value in the descending sorted list of daily site values for year y. Thus, $P_{0.99,\ y}$ = the nth largest value.

(b) The 1-hour primary standard design value for a site is mean of the three annual 99th percentile values, rounded according to the conventions in section 4.

TABLE 1

Annual number of days with valid data for year ''y'' (cn_y)	$P_{0.99,\ y}$ is the nth maximum value of the year, where n is the listed number
1–100	1
101–200	2
201–300	3
301–366	4

PART 53—AMBIENT AIR MONITORING REFERENCE AND EQUIVALENT METHODS

8. The authority citation for part 53 continues to read as follows:

Authority: Sec. 301(a) of the Clean Air Act (42 U.S.C. sec. 1857g(a)), as amended by sec. 15(c)(2) of Public Law 91–604, 84 Stat. 1713, unless otherwise noted.

Subpart A—[Amended]

9. Section 53.2 is amended by revising paragraphs (a)(1) and (b) to read as follows:

§ 53.2. General requirements for a reference method determination.

* * * * *

(a) *Manual methods*—(1) *Sulfur dioxide (SO_2) and Lead.* For measuring SO_2 and lead, Appendixes A–2 and G of part 50 of this chapter specify unique manual FRM for measuring those pollutants. After [effective date of Appendix A–1], a new FRM for SO_2 must be an automated method that utilizes the measurement principle and calibration procedure specified in Appendix A–1 to part 50 of this chapter and must meet applicable requirements of this part, as specified in paragraph (b) of this section. Except as provided in § 53.16, other manual methods for lead will not be considered for a reference method determination under this part.

* * * * *

(b) *Automated methods.* An automated FRM for measuring SO_2, CO, O_3, or NO_2 must utilize the measurement principle and calibration procedure specified in the appropriate appendix to part 50 of this chapter (appendix A–1 only for SO_2 methods) and must have been shown in accordance with this part to meet the

requirements specified in this subpart A and subpart B of this part.

10. Section 53.8 is amended by revising paragraph (c) to read as follows:

§ 53.8 Designation of reference and equivalent methods.

* * * * *

(c) The Administrator will maintain a current list of methods designated as FRM or FEM in accordance with this part and will send a copy of the list to any person or group upon request. A copy of the list will be available via the Internet and may be available from other sources.

11. Table A–1 to Subpart A is revised to read as follows:

TABLE A–1 TO SUBPART A OF PART 53—SUMMARY OF APPLICABLE REQUIREMENTS FOR REFERENCE AND EQUIVALENT METHODS FOR AIR MONITORING OF CRITERIA POLLUTANTS

Pollutant	Reference or equivalent	Manual or automated	Applicable part 50 appendix	Applicable subparts of part 53					
				A	B	C	D	E	F
SO_2	Reference	Manual	A–2						
		Automated	A–1	✓	✓				
	Equivalent	Manual	A–1	✓		✓			
		Automated	A–1	✓	✓	✓			
CO	Reference	Automated	C	✓	✓				
	Equivalent	Manual	C	✓		✓			
		Automated	C	✓	✓	✓			
O_3	Reference	Automated	D	✓	✓				
	Equivalent	Manual	D	✓		✓			
		Automated	D	✓	✓	✓			
NO_2	Reference	Automated	F	✓	✓				
	Equivalent	Manual	F	✓		✓			
		Automated	F	✓	✓	✓			
Pb	Reference	Manual	G						
	Equivalent	Manual	G	✓		✓			
		Automated	G	✓		✓			
PM_{10}–Pb	Reference	Manual	Q						
	Equivalent	Manual	Q	✓		✓			
		Automated	Q	✓		✓			
PM_{10}	Reference	Manual	J	✓			✓		
	Equivalent	Manual	J	✓		✓	✓		
		Automated	J	✓		✓	✓		
$PM_{2.5}$	Reference	Manual	L	✓				✓	
	Equivalent Class I	Manual	L	✓		✓		✓	
	Equivalent Class II	Manual	L [1]	✓		✓ [2]		✓	✓ [1 2]
	Equivalent Class III	Automated	L [1]	✓		✓		✓	✓ [1]
$PM_{10-2.5}$	Reference	Manual	L, O	✓				✓	
	Equivalent Class I	Manual	L, O	✓		✓		✓	
	Equivalent Class II	Manual	L, O	✓		✓ [2]		✓	✓ [1 2]
	Equivalent Class III	Automated	L [1], O [1]	✓		✓		✓	✓ [1]

[1] Some requirements may apply, based on the nature of each particular candidate method, as determined by the Administrator.
[2] Alternative Class III requirements may be substituted.

Subpart B—[Amended]

12. Section 53.20 is amended as follows:

A. By revising paragraph (b).

B. In paragraph (c), by revising Table B–1.

The revisions read as follows:

§ 53.20 General provisions.

* * * * *

(b) For a candidate method having more than one selectable measurement range, one range must be that specified in table B–1 (standard range for SO_2), and a test analyzer representative of the method must pass the tests required by this subpart while operated in that range. The tests may be repeated for one or more broader ranges (*i.e.,* ones extending to higher concentrations) than the range specified in table B–1, provided that the range does not extend to concentrations more than four times the upper range limit specified in table B–1. For broader ranges, only the tests for range (calibration), noise at 80% of the upper range limit, and lag, rise and fall time are required to be repeated. The tests may be repeated for one or more narrower ranges (ones extending to lower concentrations) than that specified in table B–1. For SO_2 methods, table B–1 specifies special performance requirements for narrower (lower) ranges. For methods other than SO_2, only the tests for range (calibration), noise at 0% of the measurement range, and lower detectable limit are required to be repeated. If the tests are conducted or passed only for the specified range (standard range for SO_2), any FRM or FEM method determination with respect to the method will be limited to that range. If the tests are passed for both the specified range and one or more broader ranges, any such determination will include the additional range(s) as well as the specified range, provided that the tests required by subpart C of this part (if applicable) are met for the broader range(s). If the tests are passed for both the specified range and one or more narrower ranges, any FRM or FEM method determination for the method will include the narrower range(s) as well as the specified range. Appropriate test data shall be submitted for each range sought to be included in a FRM or FEM method determination under this paragraph (b).

(c) * * *

TABLE B–1—PERFORMANCE SPECIFICATIONS FOR AUTOMATED METHODS

Performance parameter	Units [1]	SO_2		O_3	CO	NO_2	Definitions and test procedures
		Std. range [3]	Lower range [2 3]				
1. Range	ppm	0–0.5	<0.5	0–0.5	0–50	0–0.5	Sec. 53.23(a).
2. Noise	ppm	0.001	0.0005	0.005	50	0.005	Sec. 53.23(b).
3. Lower detectable limit	ppm	0.002	0.001	0.010	1.0	0.010	Sec. 53.23(c).
4. Interference equivalent							
Each interferent	ppm	±0.005	±0.005	±0.02	±1.0	±0.02	Sec. 53.23(d).
Total, all interferents	ppm	0.020	0.020	0.06	1.5	0.04	Sec. 53.23(d).
5. Zero drift, 12 and 24 hour	ppm	±0.004	±0.002	±0.02	±1.0	±0.02	Sec. 53.23(e).
7. Span drift, 24 hour:							
20% of upper range limit	Percent			±20.0	±10.0	±20.0	Sec. 53.23(e).
80% of upper range limit	Percent	±5.0	±5.0	±5.0	±2.5	±5.0	Sec. 53.23(e).
8. Lag time	Minutes	2	2	20	10	20	Sec. 53.23(e).
9. Rise time	Minutes	2	2	15	5	15	Sec. 53.23(e).
10. Fall time	Minutes	2	2	15	5	15	Sec. 53.23(e).
11. Precision:							
20% of upper range limit	ppm	.....	.....	0.010	0.5	0.020	Sec. 53.23(e).
	Percent	2	2	.....	.....	.....	Sec. 53.23(e).
80% of upper range limit	ppm	.....	.....	0.010	0.5	0.030	Sec. 53.23(e).
	Percent	2	2	.....	.....	.....	Sec. 53.23(e).

[1] To convert from parts per million (ppm) to μg/m[3] at 25 °C and 760 mm Hg, multiply by M/0.02447, where M is the molecular weight of the gas. Percent means percent of the upper range limit.

[2] Tests for interference equivalent and lag time do not need to be repeated for any lower SO_2 range provided the test for the standard range shows that the lower range specification is met for each of these test parameters.

[3] For candidate analyzers having automatic or adaptive time constants or smoothing filters, describe their functional nature, and describe and conduct suitable tests to demonstrate their function aspects and verify that performances for calibration, noise, lag, rise, fall times, and precision are within specifications under all applicable conditions. For candidate analyzers with operator-selectable time constants or smoothing filters, conduct calibration, noise, lag, rise, fall times, and precision tests at the highest and lowest settings that are to be included in the FRM or FEM designation.

* * * * *

13. Section 53.21 is amended by revising paragraph (a) to read as follows:

§ 53.21 Test conditions.

(a) *Set-up and start-up* of the test analyzer shall be in strict accordance with the operating instructions specified in the manual referred to in § 53.4(b)(3). Allow adequate warm-up or stabilization time as indicated in the operating instructions before beginning the tests. The test procedures assume that the test analyzer has an analog measurement signal output that is connected to a suitable strip chart recorder of the servo, null-balance type. This recorder shall have a chart width of a least 25 centimeters, chart speeds up to 10 cm per hour, a response time of 1 second or less, a deadband of not more than 0.25 percent of full scale, and capability either of reading measurements at least 5 percent below zero or of offsetting the zero by at least 5 percent. If the test analyzer does not have an analog signal output, or if other types of measurement data output are used, an alternative measurement data recording device (or devices) may be used for the tests, provided it is reasonably suited to the nature and purposes of the tests and an analog representation of the analyzer measurements for each test can be plotted or otherwise generated that is reasonably similar to the analog measurement recordings that would be produced by a conventional chart recorder.

* * * * *

14. Section 53.22(d) is amended by revising Table B–2 to read as follows:

§ 53.22 Generation of test atmospheres.

* * * * *

(d) * * *

TABLE B–2—TEST ATMOSPHERES

Test gas	Generation	Verification
Ammonia	Permeation device. Similar to system described in references 1 and 2.	Indophenol method, reference 3.
Carbon dioxide	Cylinder of zero air or nitrogen containing CO_2 as required to obtain the concentration specified in table B–3.	Use NIST-certified standards whenever possible. If NIST standards are not available, obtain 2 standards from independent sources which agree within 2 percent, or obtain one standard and submit it to an independent laboratory for analysis, which must agree within 2 percent of the supplier's nominal analysis.
Carbon monoxide	Cylinder of zero air or nitrogen containing CO as required to obtain the concentration specified in table B–3.	Use a FRM CO analyzer as described in reference 8.
Ethane	Cylinder of zero air or nitrogen containing ethane as required to obtain the concentration specified in table B–3.	Gas chromatography, ASTM D2820, reference 10. Use NIST-traceable gaseous methane or propane standards for calibration.
Ethylene	Cylinder of pre-purified nitrogen containing ethylene as required to obtain the concentration specified in table B–3.	Do.

TABLE B–2—TEST ATMOSPHERES—Continued

Test gas	Generation	Verification
Hydrogen chloride	Cylinder[1] of pre-purified nitrogen containing approximately 100 ppm of gaseous HCL. Dilute with zero air to concentration specified in table B–3.	Collect samples in bubbler containing distilled water and analyze by the mercuric thiocyante method, ASTM (D612), p. 29, reference 4.
Hydrogen sulfide	Permeation device system described in references 1 and 2.	Tentative method of analysis for H_2S content of the atmosphere, p. 426, reference 5.
Methane	Cylinder of zero air containing methane as required to obtain the concentration specified in table B–3.	Gas chromatography ASTM D2820, reference 10. Use NIST-traceable methane standards for calibration.
Nitric oxide	Cylinder[1] of pre-purified nitrogen containing approximately 100 ppm NO. Dilute with zero air to required concentration.	Gas phase titration as described in reference 6, section 7.1.
Nitrogen dioxide	1. Gas phase titration as described in reference 6 2. Permeation device, similar to system described in reference 6.	1. Use an FRM NO_2 analyzer calibrated with a gravimetrically calibrated permeation device. 2. Use an FRM NO_2 analyzer calibrated by gas-phase titration as described in reference 6.
Ozone	Calibrated ozone generator as described in reference 9	Use an FEM ozone analyzer calibrated as described in reference 9.
Sulfur dioxide	1. Permeation device as described in references 1 and 2 2. Dynamic dilution of a cylinder containing approximately 100 ppm SO_2 as described in reference 7.	Use an SO_2 FRM or FEM analyzer as described in reference 7.
Water	Pass zero air through distilled water at a fixed known temperature between 20° and 30 °C such that the air stream becomes saturated. Dilute with zero air to concentration specified in table B–3.	Measure relative humidity by means of a dew-point indicator, calibrated electrolytic or piezo electric hygrometer, or wet/dry bulb thermometer.
Xylene	Cylinder of pre-purified nitrogen containing 100 ppm xylene. Dilute with zero air to concentration specified in table B–3.	Use NIST-certified standards whenever possible. If NIST standards are not available, obtain 2 standards from independent sources which agree within 2 percent, or obtain one standard and submit it to an independent laboratory for analysis, which must agree within 2 percent of the supplier's nominal analysis.
Zero air	1. Ambient air purified by appropriate scrubbers or other devices such that it is free of contaminants likely to cause a detectable response on the analyzer. 2. Cylinder of compressed zero air certified by the supplier or an independent laboratory to be free of contaminants likely to cause a detectable response on the analyzer.	

[1] Use stainless steel pressure regulator dedicated to the pollutant measured.

Reference 1. O'Keefe, A. E., and Ortaman, G. C. "Primary Standards for Trace Gas Analysis," *Anal. Chem.* 38, 760 (1966).
Reference 2. Scaringelli, F. P., A. E. Rosenberg, E*, and Bell, J. P., "Primary Standards for Trace Gas Analysis." *Anal. Chem.* 42, 871 (1970).
Reference 3. "Tentative Method of Analysis for Ammonia in the Atmosphere (Indophenol Method)", *Health Lab Sciences,* vol. 10, No. 2, 115–118, April 1973.
Reference 4. 1973 Annual Book of ASTM Standards, American Society for Testing and Materials, 1916 Race St., Philadelphia, PA.
Reference 5. *Methods for Air Sampling and Analysis,* Intersociety Committee, 1972, American Public Health Association, 1015.
Reference 6. 40 CFR 50 Appendix F, "Measurement Principle and Calibration Principle for the Measurement of Nitrogen Dioxide in the Atmosphere (Gas Phase Chemiluminescence)."
Reference 7. 40 CFR 50 Appendix A–1, "Measurement Principle and Calibration Procedure for the Measurement of Sulfur Dioxide in the Atmosphere (Ultraviolet Fluorescence)."
Reference 8. 40 CFR 50 Appendix C, "Measurement Principle and Calibration Procedure for the Measurement of Carbon Monoxide in the Atmosphere" (Non-Dispersive Infrared Photometry)".
Reference 9. 40 CFR 50 Appendix D, "Measurement Principle and Calibration Procedure for the Measurement of Ozone in the Atmosphere".
Reference 10. "Standard Test Method for C, through C5 Hydrocarbons in the Atmosphere by Gas Chromatography", D 2820, 1987 Annual Book of Aston Standards, vol 11.03, American Society for Testing and Materials, 1916 Race St., Philadelphia, PA 19103.

* * * * *

15. Section 53.23(d) is amended by revising Table B–3 to read as follows:

§ 53.23 Test procedures.

(d) * * *

* * * * *

TABLE B–3—INTERFERENT TEST CONCENTRATION,[1] PARTS PER MILLION

Pollutant	Analyzer type	Hydrochloric acid	Ammonia	Hydrogen sulfide	Sulfur dioxide	Nitrogen dioxide	Nitric oxide	Carbon dioxide	Ethylene	Ozone	M-xylene	Water vapor	Carbon monoxide	Methane	Ethane	Naphthalene
SO_2	Ultraviolet fluorescence			[5]0.1	[4]0.14	0.5	0.5			0.5	0.2	20,000				[6]0.05
SO_2	Flame photometric			0.01	[4]0.14			750				[3]20,000	50			
SO_2	Gas chromatography			0.1	[4]0.14			750				[3]20,000	50			
SO_2	Spectrophotometric-wet chemical (pararosanaline).	0.2	0.1	0.1	[4]0.14	0.5		750		0.5						
SO_2	Electrochemical	0.2	0.1	0.1	[4]0.14	0.5	0.5		0.2	0.5		[3]20,000				
SO_2	Conductivity	0.2	0.1		[4]0.14	0.5		750								
SO_2	Spectrophotometric-gas phase, including DOAS.				[4]0.14	0.5				0.5	0.2					
O_3	Chemiluminescent			[3]0.1				750		[4]0.08		[3]20,000				
O_3	Electrochemical		[3]0.1		0.5	0.5				[4]0.08						

TABLE B–3—INTERFERENT TEST CONCENTRATION,[1] PARTS PER MILLION—Continued

Pollutant	Analyzer type	Hydrochloric acid	Ammonia	Hydrogen sulfide	Sulfur dioxide	Nitrogen dioxide	Nitric oxide	Carbon dioxide	Ethylene	Ozone	M-xylene	Water vapor	Carbon monoxide	Methane	Ethane	Naphthalene
O_3	Spectrophotometric-wet chemical (potassium iodide).		[3]0.1		0.5	0.5	[3]0.5			[4]0.08						
O_3	Spectrophotometric-gas phase, including ultraviolet absorption and DOAS).				0.5	0.5	0.5			[4]0.08	0.02	20,000				
CO	Infrared							750				20,000	[4]10			
CO	Gas chromatography with flame ionization detector.											20,000	[4]10		0.5	
CO	Electrochemical						0.5		0.2			20,000	[4]10			
CO	Catalytic combustion-thermal detection.		0.1					750	0.2			20,000	[4]10	5.0	0.5	
CO	IR fluorescence							750				20,000	[4]10		0.5	
CO	Mercury replacement-UV photometric.								0.2				[4]10		0.5	
NO_2	Chemiluminescent		[3]0.1		0.5	[4]0.1	0.5					20,000				
NO_2	Spectrophotometric-wet chemical (azo-dye reaction).				0.5	[4]0.1	0.5	750		0.5						
NO_2	Electrochemical	0.2	[3]0.1		0.5	[4]0.1	0.5	750		0.5		20,000	50			
NO_2	Spectrophotometric-gas phase.		[3]0.1		0.5	[4]0.1	0.5			0.5		20,000	50			

[1] Concentrations of interferent listed must be prepared and controlled to ±10 percent of the stated value.
[2] Analyzer types not listed will be considered by the Administrator as special cases.
[3] Do not mix with the pollutant.
[4] Concentration of pollutant used for test. These pollutant concentrations must be prepared to ±10 percent of the stated value.
[5] If candidate method utilizes an elevated-temperature scrubber for removal of aromatic hydrocarbons, perform this interference test.
[6] If naphthalene test concentration cannot be accurately quantified, remove the scrubber, use a test concentration that causes a full scale response, reattach the scrubber, and evaluate response for interference.

* * * * *

Subpart C—[Amended]

16. Section 53.32 is amended by revising paragraph (e)(2) to read as follows:

§ 53.32 Test procedures for methods for SO_2, CO, O_3, and NO_2.

* * * * *

(e) * * *

(2) For a candidate method having more than one selectable range, one range must be that specified in table B–1 of subpart B of this part, and a test analyzer representative of the method must pass the tests required by this subpart while operated on that range. The tests may be repeated for one or more broader ranges (*i.e.,* ones extending to higher concentrations) than the one specified in table B–1 of subpart B of this part, provided that such a range does not extend to concentrations more than four times the upper range limit specified in table B–1 of subpart B of this part and that the test analyzer has passed the tests required by subpart B of this part (if applicable) for the broader range. If the tests required by this subpart are conducted or passed only for the range specified in table B–1 of subpart B of this part, any equivalent method determination with respect to the method will be limited to that range. If the tests are passed for both the specified range and a broader range (or ranges), any such determination will include the broader range(s) as well as the specified range. Appropriate test data shall be submitted for each range sought to be included in such a determination.

* * * * *

17. Table C–1 to Subpart C is revised to read as follows:

TABLE C–1 TO SUBPART C OF PART 53—TEST CONCENTRATION RANGES, NUMBER OF MEASUREMENTS REQUIRED, AND MAXIMUM DISCREPANCY SPECIFICATIONS

Pollutant	Concentration range, parts per million (ppm)	Simultaneous measurements required				Maximum discrepancy specification, parts per million
		1-hour		24-hour		
		First set	Second set	First set	Second set	
Ozone	Low 0.06 to 0.10	5	6			0.02
	Med. 0.15 to 0.25	5	6			0.03
	High 0.35 to 0.46	4	6			0.04
	Total	14	18			
Carbon monoxide	Low 7 to 11	5	6			1.5
	Med. 20 to 30	5	6			2.0
	High 25 to 45	4	6			3.0
	Total	14	18			
Sulfur dioxide	Low 0.02 to 0.05	5	6	3	3	0.02
	Med. 0.10 to 0.15	5	6	2	3	0.03
	High 0.30 to 0.50	4	6	2	2	0.04
	Total	14	18	7	8	

TABLE C–1 TO SUBPART C OF PART 53—TEST CONCENTRATION RANGES, NUMBER OF MEASUREMENTS REQUIRED, AND MAXIMUM DISCREPANCY SPECIFICATIONS—Continued

Pollutant	Concentration range, parts per million (ppm)	Simultaneous measurements required				Maximum discrepancy specification, parts per million
		1-hour		24-hour		
		First set	Second set	First set	Second set	
Nitrogen dioxide	Low 0.02 to 0.08	.....	.....	3	3	0.02
	Med. 0.10 to 0.20	.....	.....	2	2	0.02
	High 0.25 to 0.35	.....	.....	2	2	0.03
	Total	.....	.....	7	8	.....

PART 58—AMBIENT AIR QUALITY SURVEILLANCE

18. The authority citation for part 58 continues to read as follows:

Authority: 42 U.S.C. 7403, 7410, 7601(a), 7611, and 7619.

Subpart B—[Amended]

19. Section 58.10 is amended by adding paragraph (a)(6) to read as follows:

§ 58.10 Annual monitoring network plan and periodic network assessment.

(a) * * *

(6) A plan for establishing SO_2 monitoring sites in accordance with the requirements of appendix D to this part shall be submitted to the EPA Regional Administrator by July 1, 2011 as part of the annual network plan required in paragraph (a)(1) of this section. The plan shall provide for all required SO_2 monitoring sites to be operational by January 1, 2013.

* * * * *

20. Section 58.12 is amended by adding paragraph (g) to read as follows:

§ 58.12 Operating schedules.

* * * * *

(g) For continuous SO_2 analyzers, the maximum 5-minute block average concentration of the twelve 5-minute blocks in the hour must be collected except as noted in § 58.12(a).

21. Section 58.13 is amended by adding paragraph (d) to read as follows:

§ 58.13 Monitoring network completion.

* * * * *

(d) The network of SO_2 monitors must be physically established no later than January 1, 2013, and at that time, must be operating under all of the requirements of this part, including the requirements of appendices A, C, D, and E to this part.

22. Section 58.16 is amended by adding paragraph (g) to read as follows:

§ 58.16 Data submittal and archiving requirements.

* * * * *

(g) Any State, or where applicable, local agency operating an SO_2 monitor shall report the maximum 5-minute SO_2 block average of the twelve 5-minute block averages in each hour, in addition to the hourly SO_2 average.

23. Appendix A to Part 58 is amended by adding paragraph 2.3.1.6 to read as follows:

Appendix A to Part 58—Quality Assurance Requirements for SLAMS, SPMs and PSD Air Monitoring

* * * * *

2.3.1.6 Measurement Uncertainty for SO_2. The goal for acceptable measurement uncertainty for precision is defined as an upper 90 percent confidence limit for the coefficient of variation (CV) of 15 percent and for bias as an upper 95 percent confidence limit for the absolute bias of 15 percent.

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24. Appendix C to Part 58 is amended by adding paragraph 2.1.2 to read as follows:

Appendix C to Part 58—Ambient Air Quality Monitoring Methodology

* * * * *

2.1.2 Any SO_2 FRM or FEM used for making NAAQS decisions, as prescribed in 40 CFR Part 50 Appendix A–1, must be capable of providing 1-hour averaged and 5-minute averaged concentration data.

* * * * *

25. Appendix D to Part 58 is amended by revising paragraph 4.4 to read as follows:

Appendix D to Part 58—Network Design Criteria for Ambient Air Quality Monitoring

* * * * *

4.4 Sulfur Dioxide (SO_2) Design Criteria.

4.4.1 General Requirements. State and, where appropriate, local agencies must operate a minimum number of required SO_2 monitoring sites as described below.

4.4.2 Requirement for Monitoring by the Population Weighted Emissions Index. (a) The population weighted emissions index (PWEI) shall be calculated by states for each CBSA they contain or share with another state or states for use in the implementation of or adjustment to the SO_2 monitoring network. The PWEI shall be calculated by multiplying the population of each CBSA, using the most current census data, by the total amount of SO_2 in tons per year emitted within the CBSA area, using an aggregate of the most recent county level emissions data available in the National Emissions Inventory for each county in each CBSA. The resulting product shall be divided by one million, providing a PWEI value, the units of which are million persons-tons per year. For any CBSA with a calculated PWEI value equal to or greater than 1,000,000, a minimum of three SO_2 monitors are required within that CBSA. For any CBSA with a calculated PWEI value equal to or greater than 10,000, but less than 1,000,000, a minimum of two SO_2 monitors are required within that CBSA. For any CBSA with a calculated PWEI value equal to or greater than 5,000, but less than 10,000, a minimum of one SO_2 monitor is required within that CBSA.

(1) The SO_2 monitoring site(s) required as a result of the PWEI in each CBSA shall be sited by states through a process of identifying locations within the boundaries of that CBSA where maximum ground-level 1-hour SO_2 concentrations occur due to emissions that originate inside and/or outside of that CBSA. Where a state or local air monitoring agency identifies multiple acceptable candidate sites where maximum hourly SO_2 concentrations are expected to occur, the monitoring agency shall select the location with the greater population exposure. Where one CBSA is required to have more than one SO_2 monitor, the monitoring sites shall not be oriented to measure maximum hourly concentrations from the same SO_2 source or group of sources, but shall monitor a different source or group of sources. Any PWEI-triggered monitors shall not count toward satisfying any required monitors resulting from the state emissions triggered requirements described below.

(2) The number of SO_2 monitors operated as a result of the PWEI shall be reviewed and adjusted as needed as a part of the 5-year network assessment cycle required in § 58.10 of this part.

(b) [Reserved]

4.4.3 Requirement for State Emission Triggered SO_2 Monitoring. (a) Each State shall operate a minimum number of monitors based on that state's contribution of SO_2 emissions to the national, anthropogenic SO_2 inventory as identified in the most recent

National Emissions Inventory. Each state shall operate one monitor for each percent that it contributes to the NEI. The percent contribution shall be rounded to the nearest whole integer value. Every state shall operate a minimum of one monitor under this requirement.

(1) Each state emission triggered SO_2 monitoring station shall be sited by states through a process of identifying locations within the boundaries of that state where maximum ground-level 1-hour SO_2 concentrations occur due to SO_2 source emissions originate inside or outside the state. Where a state has CBSAs with PWEI-triggered monitoring, the PWEI-triggered monitors shall not count toward the emission-triggered monitors. State emission-triggered monitors shall not be sited to measure maximum hourly concentrations from the same SO_2 source or group of sources as another SO_2 monitor, but shall measure maximum hourly concentrations resulting from a different source or group of sources.

(2) The number of SO_2 monitors operated as a result of state-level emissions shall be reviewed and adjusted as needed as a part of the 5-year network assessment cycle required in § 58.10 of this part.

(b) [Reserved]

4.4.4 Regional Administrator Required Monitoring. The Regional Administrator may require additional SO_2 monitoring stations above the minimum number of monitors required in 4.4.2 and 4.4.3 of this appendix, where the minimum monitoring requirements are not sufficient to meet monitoring objectives. The Regional Administrator may require, at his/her discretion, additional monitors in situations where an area has the potential to have concentrations that may violate or contribute to the violation of the NAAQS and the area is not monitored under the minimum monitoring provisions described above. The Regional Administrator and the responsible State or local air monitoring agency shall work together to design and/or maintain the most appropriate SO_2 network to provide sufficient data to meet monitoring objectives.

4.4.5 SO_2 Monitoring Spatial Scales. (a) The appropriate spatial scales for SO_2 SLAMS monitors are the microscale, middle, neighborhood, and possibly urban scales. Monitors sited at the microscale, middle, and neighborhood scales are suitable for determining maximum hourly concentrations for SO_2 and can be used for compliance actions. Monitors sited at urban scales are useful for identifying SO_2 transport, trends, and, if sited upwind of local sources, background concentrations.

(1) Microscale—This scale would typify areas in close proximity to SO_2 point and area sources. Emissions from stationary point and area sources, and non-road sources may, under certain plume conditions, result in high ground level concentrations at the microscale. The microscale typically represents an area impacted by the plume with dimensions extending up to approximately 100 meters.

(2) Middle scale—This scale generally represents air quality levels in areas up to several city blocks in size with dimensions on the order of approximately 100 meters to 500 meters. The middle scale may include locations of expected maximum short-term concentrations due to proximity to major SO_2 point, area, and/or non-road sources.

(3) Neighborhood scale—The neighborhood scale would characterize air quality conditions throughout some relatively uniform land use areas with dimensions in the 0.5 to 4.0 kilometer range. Emissions from stationary point and area sources may, under certain plume conditions, result in high SO_2 concentrations at the neighborhood scale. Where a neighborhood site is located away from immediate SO_2 sources, the site may be useful in representing typical air quality values for a larger residential area, and therefore suitable for population exposure and trends analyses.

(4) Urban scale—Measurements in this scale would be used to estimate concentrations over large portions of an urban area with dimensions from 4 to 50 kilometers. Such measurements would be useful for assessing trends in area-wide air quality, and hence, the effectiveness of large scale air pollution control strategies. Urban scale sites may also support other monitoring objectives of the SO_2 monitoring network such as identifying trends, and when monitors are sited upwind of local sources, background concentrations.

(b) [Reserved]

4.4.6 NCore Monitoring. SO_2 measurements are included within the NCore multipollutant site requirements as described in paragraph (3)(b) of this appendix. NCore-based SO_2 measurements are primarily used to characterize SO_2 trends and assist in understanding SO_2 transport across representative areas in urban or rural locations and are also used for comparison with the SO_2 NAAQS.

* * * * *

26. Appendix G to Part 58 is amended as by revising Table 2 to read as follows:

Appendix G to Part 58—Uniform Air Quality Index (AQI) and Daily Reporting

* * * * *

TABLE 2—BREAKPOINTS FOR THE AQI

These breakpoints							Equal these AQIs	
O_3 (ppm) 8-hour	O_3 (ppm) 1-hour [1]	$PM_{2.5}$ (µg/m^3)	PM_{10} (µg/m^3)	CO (ppm)	SO_2 (ppm) 1-hour	NO_2 (ppm) 1-hour	AQI	Category
0.000–0.059 ..	.....	0.0–15.4	0–54	0.0–4.4	0–(0.025–0.050)	0–(0.040–0.053)	0–50	Good.
0.060–0.075 ..	.....	15.5–40.4	55–154	4.5–9.4	(0.026–0.051)–(0.050–0.100)	(0.041–0.054)–(0.080–0.100)	51–100	Moderate.
0.076–0.095 ..	0.125–0.164	40.5–65.4	155–254	9.5–12.4	(0.051–0.101)–(.175–.200)	(0.081–0.101)–(0.360–0.370)	101–150	Unhealthy for Sensitive Groups.
0.096–0.115 ..	0.165–0.204	[3] 65.5–150.4	255–354	12.5–15.4	(0.176–0.201)–(.304)	(0.361–0.371)–0.64	151–200	Unhealthy.
0.116–0.374 ..	0.205–0.404	[3] 150.5–250.4	355–424	15.5–30.4	0.305–0.604	0.65–1.24	201–300	Very Unhealthy.
([2])	0.405–0.504	[3] 250.5–350.4	425–504	30.5–40.4	0.605–0.804	1.25–1.64	301–400	
([2])	0.505–0.604	[3] 350.5–500.4	505–604	40.5–50.4	0.805–1.004	1.65–2.04	401–500	Hazardous.

[1] Areas are generally required to report the AQI based on 8-hour ozone values. However, there are a small number of areas where an AQI based on 1-hour ozone values would be more precautionary. In these cases, in addition to calculating the 8-hour ozone index value, the 1-hour ozone index value may be calculated, and the maximum of the two values reported.

[2] 8-hour O_3 values do not define higher AQI values (≥301). AQI values of 301 or greater are calculated with 1-hour O_3 concentrations.

[3] If a different SHL for $PM_{2.5}$ is promulgated, these numbers will change accordingly.

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Part III

Department of Energy

Federal Energy Regulatory Commission

18 CFR Part 40

Mandatory Reliability Standards for the Calculation of Available Transfer Capability, Capacity Benefit Margins, Transmission Reliability Margins, Total Transfer Capability, and Existing Transmission Commitments and Mandatory Reliability Standards for the Bulk-Power System; Final Rule

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 40

[Docket No. RM08–19–000, et al.; Order No. 729]

Mandatory Reliability Standards for the Calculation of Available Transfer Capability, Capacity Benefit Margins, Transmission Reliability Margins, Total Transfer Capability, and Existing Transmission Commitments and Mandatory Reliability Standards for the Bulk-Power System

Issued November 24, 2009.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Final rule.

SUMMARY: Pursuant to section 215 of the Federal Power Act, the Commission approves six Modeling, Data, and Analysis Reliability Standards submitted to the Commission for approval by the North American Electric Reliability Corporation, the Electric Reliability Organization certified by the Commission. The approved Reliability Standards require certain users, owners, and operators of the Bulk-Power System to develop consistent methodologies for the calculation of available transfer capability or available flowgate capability. Pursuant to section 215(d)(5) of the FPA and § 39.5(f) of our regulations, the Commission also directs the ERO to develop certain modifications to the MOD Reliability Standards. Finally, the Commission directs NERC to retire the existing MOD Reliability Standards replaced by the versions approved here.

DATES: *Effective Date:* This rule will become effective February 8, 2010.

FOR FURTHER INFORMATION CONTACT:

Jonathan First (Legal Information), Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–8529.

Cory Lankford (Legal Information), Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–6711.

Christopher Young (Technical Information), Office of Electric Reliability, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–6403.

SUPPLEMENTARY INFORMATION:

Table of Contents

Before Commissioners: Jon Wellinghoff, Chairman; Suedeen G. Kelly, Marc Spitzer, and Philip D. Moeller.

1. Pursuant to section 215 of the Federal Power Act (FPA),[1] the Federal Energy Regulatory Commission (Commission) approves, and directs modifications to, six Modeling, Data and Analysis (MOD) Reliability Standards submitted to the Commission by the North American Electric Reliability Corporation (NERC), the Commission-certified Electric Reliability Organization (ERO) for the United States.[2] The approved Reliability Standards pertain to methodologies for the consistent and transparent calculation of available transfer capability or available flowgate capability. Pursuant to section 215(d)(5) of the FPA and section 39.5(f) of our regulations, the Commission directs the ERO to develop certain modifications to the MOD Reliability Standards.[3] The Commission also directs NERC to retire the existing MOD Reliability Standards replaced by the versions approved here. The retirement of these Reliability Standards will be effective upon the effective date of the approved MOD Reliability Standards.

2. In Order No. 890, the Commission found that the lack of a consistent and transparent methodology for calculating available transfer capability is a significant problem because the calculation of available transfer capability, which varies greatly depending on the criteria and assumptions used, may allow the transmission service provider to discriminate in subtle ways against its competitors.[4] In Order No. 693, the Commission reiterated its concerns expressed in Order No. 890 and stated that available transfer capability raises both comparability and reliability issues, and that it would be irresponsible to require consistency in the available transfer capability calculation without considering the reliability impact of those decisions.[5] The calculation of available transfer capability is one of the most critical functions under the open access transmission tariff (OATT) because it determines whether transmission customers can access alternative power supplies. Improving transparency and consistency of available transfer capability calculation methodologies will eliminate transmission service providers' wide discretion in calculating available transfer capability and ensure that customers are treated fairly in seeking alternative power supplies. The Commission believes that the Reliability Standards approved here address the potential for undue discrimination by requiring industry-wide transparency and increased consistency regarding all components of the available transfer capability calculation methodology and certain definitions, data, and modeling assumptions.

3. The Commission approves the Reliability Standards filed by NERC in this proceeding as just, reasonable, not unduly discriminatory or preferential, and in the public interest.[6] These Reliability Standards represent a step forward in eliminating the broad discretion previously afforded transmission service providers in the calculation of available transfer capability. The approved Reliability Standards will enhance transparency in the calculation of available transfer capability, requiring transmission operators and transmission service providers to calculate available transfer capability using a specific methodology that is both explicitly documented and available to reliability entities who request it.[7] The approved Reliability Standards also require documentation of the detailed representations of the various components that comprise the available transfer capability equation, including the specification of modeling and risk assumptions and the disclosure of outage processing rules to other reliability entities. These actions will make the processes to calculate available transfer capability and its various components more transparent, which in turn will allow the Commission and others to ensure consistency in their application. By promoting consistency, standardization and transparency, these Reliability Standards enhance the reliability of the Bulk-Power System.

4. On March 19, 2009, the Commission issued its Notice of Proposed Rulemaking (NOPR) proposing to approve the six MOD

[1] 16 U.S.C. 824o (2006).

[2] *North American Electric Reliability Corp.,* 116 FERC ¶ 61,062 (ERO Certification Order), *order on reh'g & compliance,* 117 FERC ¶ 61,126 (2006) (ERO Rehearing Order), *aff'd, Alcoa Inc.* v. *FERC,* 564 F.3d 1342 (D.C. Cir. 2009).

[3] 16 U.S.C. 824o(d)(5).

[4] *Preventing Undue Discrimination and Preference in Transmission Service,* Order No. 890, 72 FR 12266 (Mar. 15, 2007), FERC Stats. & Regs. ¶ 31,241 (2007), *order on reh'g,* Order No. 890–A, 73 FR 2984 (Jan. 16, 2008), FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g,* Order No. 890–B, 123 FERC ¶ 61,299 (2008), *order on reh'g,* Order No. 890–C, 126 FERC ¶ 61,228 (2009).

[5] *Mandatory Reliability Standards for the Bulk-Power System,* Order No. 693, 72 FR 16416 (Apr. 4, 2007), FERC Stats. & Regs. ¶ 31,242, at P 1022 (2007), *order on reh'g,* Order No. 693–A, 120 FERC ¶ 61,053 (2007).

[6] 16 U.S.C. 824o(d)(2).

[7] Reliability entities include: Transmission service providers, planning coordinators, reliability coordinators, and transmission operators as those entities are defined in the NERC *Glossary of Terms Used in Reliability Standards (Glossary), (Effective February 12, 2008), available at: http://www.nerc.com/docs/standards/rs/Glossary_12Feb08.pdf.* Standards adopted by the North American Energy Standards Board (NAESB) govern disclosure of this information to other entities. The Commission accepts the associated NAESB business practices in a Final Rule issued concurrently in Docket No. RM05–5–013. *See Standards for Business Practices and Communication Protocols for Public Utilities, No. 676–E, 129 FERC ¶ 61,162 (2009).*

Reliability Standards.[8] The Commission also proposed to direct NERC to retire the currently effective MOD Reliability Standards along with one FAC Reliability Standard. The Commission proposed that NERC retain another FAC Reliability Standard, FAC–012–1, and proposed that the ERO develop modifications to conform with the MOD Reliability Standards approved herein. The Commission also proposed to direct NERC to expand the disclosure provisions and conduct audits of certain implementation documents associated with the Reliability Standards to be approved herein. In response to the NOPR, comments were filed by 37 interested parties. In the discussion below, we address the issues raised by these comments. Appendix A to this Final Rule lists the entities that filed comments on the NOPR.

I. Background

A. Order Nos. 888 and 889

5. In April 1996, as part of its statutory obligation under sections 205 and 206 of the FPA [9] to remedy undue discrimination, the Commission adopted Order No. 888 prohibiting public utilities from using their monopoly power over transmission to unduly discriminate against others.[10] In that order, the Commission required all public utilities that own, control or operate facilities used for transmitting electric energy in interstate commerce to file open access non-discriminatory transmission tariffs that contained minimum terms and conditions of non-discriminatory service. It also obligated such public utilities to ''functionally unbundle'' their generation and transmission services. This meant that public utilities had to take transmission service (including ancillary services) for their own new wholesale sales and purchases of electric energy under the open access tariffs, and to separately state their rates for wholesale generation, transmission and ancillary services.[11] Each public utility was required to file the *pro forma* OATT included in Order No. 888 without any deviation (except a limited number of terms and conditions that reflect regional practices).[12] After their OATTs became effective, public utilities were allowed to file, pursuant to section 205 of the FPA, deviations that were consistent with or superior to the *pro forma* OATT's terms and conditions.

6. The same day it issued Order No. 888, the Commission issued a companion order, Order No. 889,[13] addressing the separation of vertically integrated utilities' transmission and merchant functions, the information transmission service providers were required to make public, and the electronic means they were required to use to do so. Order No. 889 imposed Standards of Conduct governing the separation of, and communications between, the utility's transmission and wholesale power functions, to prevent the utility from giving its merchant arm preferential access to transmission information. All public utilities that owned, controlled or operated facilities used in the transmission of electric energy in interstate commerce were required to create or participate in an Open Access Same-Time Information System (OASIS) that was to provide existing and potential transmission customers the same access to transmission information.

7. Among the information public utilities were required to post on their OASIS was the transmission service provider's calculation of available transfer capability. Though the Commission acknowledged that before-the-fact measurement of the availability of transmission service is ''difficult,'' the Commission concluded that it was important to give potential transmission customers ''an easy-to-understand indicator of service availability.'' [14] Because formal methods did not then exist to calculate available transfer capability and total transfer capability, the Commission encouraged industry efforts to develop consistent methods for calculating available transfer capability and total transfer capability.[15] Order No. 889 ultimately required transmission service providers to base their calculations on ''current industry practices, standards and criteria'' and to describe their methodology in an Attachment C to their tariffs.[16] The Commission noted that the requirement that transmission service providers make available for purchase only available transfer capability that is posted as available ''should create an adequate incentive for them to calculate available transfer capability and total transfer capability as accurately and as uniformly as possible.'' [17]

8. Although Order No. 888 obligated each public utility to calculate the amount of transfer capability on its system available for sale to third parties, the Commission did not standardize the methodology for calculating available transfer capability, nor did it impose any specific requirements regarding the disclosure of the methodologies used by each transmission service provider.[18] As a result, a variety of methodologies to calculate available transfer capability have been used with very few clear rules governing their use. Moreover, there was often very little transparency about the nature of these calculations, given that many transmission service providers historically filed only summary explanations of their available transfer capability methodologies in Attachment C to their OATTs.

B. Order Nos. 890 and 693

9. Section 215 of the FPA requires a Commission-certified ERO to develop mandatory and enforceable Reliability Standards that provide for the reliable operation of the Bulk-Power System, which are subject to Commission review and approval. If approved, the Reliability Standards are enforced by the ERO subject to Commission oversight, or by the Commission independently. As the ERO, NERC worked with industry to develop Reliability Standards improving consistency and transparency of available transfer capability calculation methodologies. On April 4, 2006, as

[8] *Mandatory Reliability Standards for the Calculation of Available Transfer Capability, Capacity Benefit Margins, Transmission Reliability Margins, Total Transfer Capability, and Existing Transmission Commitments and Mandatory Reliability Standards for the Bulk-Power System,* 74 FR 12747 (March 25, 2009), FERC Stats. & Regs. ¶ 32,641 (2009) (''NOPR'').

[9] 16 U.S.C. 824d, 824e.

[10] *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities,* Order No. 888, 61 FR 21540 (May 10, 1996), FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g,* Order No. 888–A, 62 FR 12274 (Mar. 14, 1997), FERC Stats. & Regs. ¶ 31,048 (1997), *order on reh'g,* Order No. 888–B, 81 FERC ¶ 61,248 (1997), *order on reh'g,* Order No. 888–C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group* v. *FERC,* 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York* v. *FERC,* 535 U.S. 1 (2002).

[11] This is known as ''functional unbundling'' because the transmission element of a wholesale sale is separated or unbundled from the generation element of that sale, although the public utility may provide both functions.

[12] *See* Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,769–70 (noting that the *pro forma* OATT expressly identified certain non-rate terms and conditions, such as the time deadlines for determining available transfer capability in section 18.4 or scheduling changes in sections 13.8 and 14.6, that may be modified to account for regional practices if such practices are reasonable, generally accepted in the region, and consistently adhered to by the transmission service provider).

[13] *Open Access Same-Time Information System (Formerly Real-Time Information Networks) and Standards of Conduct,* Order No. 889, 61 FR 21737 (May 10, 1996), FERC Stats. & Regs. ¶ 31,035 (1996), *order on reh'g,* Order No. 889–A, FERC Stats. & Regs. ¶ 31,049 (1997), *order on reh'g,* Order No. 889–B, 81 FERC ¶ 61,253 (1997).

[14] Order No. 889, FERC Stats. & Regs. ¶ 31,035 at 31,749.

[15] *Id.* at 31,750.

[16] *Id.*

[17] *Id.*

[18] Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,749 n.610.

modified on August 28, 2006, NERC submitted to the Commission a petition seeking approval of 107 proposed Reliability Standards, including 23 Reliability Standards pertaining to Modeling, Data and Analysis (MOD). The MOD group of Reliability Standards is intended to standardize methodologies and system data needed for traditional transmission system operation and expansion planning, reliability assessment and the calculation of available transfer capability in an open access environment.

10. On February 16, 2007, the Commission issued Order No. 890, which addressed and remedied opportunities for undue discrimination under the *pro forma* OATT adopted in Order No. 888. Among other things, the Commission required industry-wide consistency and transparency of all components of available transfer capability calculation and certain definitions, data and modeling assumptions. The Commission concluded that the lack of industry-wide criteria for the consistent calculation of available transfer capability poses a threat to the reliable operation of the Bulk-Power System, particularly with respect to the inability of one transmission service provider to know with certainty its neighbors' system conditions affecting its own available transfer capability values. As a result of this reliability concern, the Commission found that the proposed available transfer capability reforms were also supported by FPA section 215, through which the Commission has the authority to direct the ERO to submit a Reliability Standard that addresses a specific matter.[19] Thus, the Commission in Order No. 890 directed industry to develop Reliability Standards, using the ERO's Reliability Standards development procedures, that provide for consistency and transparency in the methodologies used by transmission owners to calculate available transfer capability.

11. The Commission stated in Order No. 890 that the available transfer capability-related Reliability Standards should, at a minimum, provide a framework for available transfer capability, total transfer capability and existing transmission commitments calculations. The Commission did not require that there be just one computational process for calculating available transfer capability because, among other things, it found that the potential for discrimination and decline in reliability level does not lie primarily in the choice of an available transfer capability calculation methodology, but rather in the consistent application of its components, input and exchange data, and modeling assumptions.[20] The Commission found that, if all of the available transfer capability components, certain data inputs and certain assumptions are consistent, the three available transfer capability calculation methodologies would produce predictable and sufficiently accurate, consistent, equivalent and replicable results.[21]

12. On March 16, 2007, the Commission issued Order No. 693, approving 83 of the 107 Reliability Standards filed by NERC in April 2006.[22] Of the 83 approved Reliability Standards, the Commission approved ten MOD Reliability Standards.[23] However, the Commission directed NERC to prospectively modify nine of the ten approved MOD Reliability Standards to be consistent with the requirements of Order No. 890.[24] The Commission reiterated the requirement from Order No. 890 that all available transfer capability components (i.e., total transfer capability, existing transmission commitments, capacity benefit margin, and transmission reliability margin) and certain data input, data exchange, and assumptions be consistent and that the number of industry-wide available transfer capability calculation formulas be few in number, transparent and produce equivalent results.[25] The Commission directed public utilities, working through the NERC Reliability Standards and North American Energy Standards Board (NAESB) business practices development processes, to produce workable solutions to implement the available transfer capability-related reforms adopted by the Commission. The Commission also deferred action on 24 proposed Reliability Standards, which did not contain sufficient information to enable the Commission to propose a disposition.[26]

II. MOD Reliability Standards

13. In response to the requirements of Order No. 890 and related directives of Order No. 693,[27] on August 29, 2008, NERC submitted for Commission approval five MOD Reliability Standards: MOD–001–1—Available Transmission System Capability, MOD–008–1—TRM Calculation Methodology (hereinafter Transmission Reliability Margin Methodology), MOD–028–1—Area Interchange Methodology, MOD–029–1—Rated System Path Methodology, and MOD–030–1—Flowgate Methodology.[28] On November 21, 2008, NERC submitted for Commission approval a sixth MOD Reliability Standard: MOD–004–1—Capacity Benefit Margin (hereinafter Capacity Benefit Margin Methodology). On March 6, 2009, NERC submitted for Commission approval: MOD–030–2—a revised Flowgate Methodology Reliability Standard and withdrew its request for approval of MOD–030–1.[29]

14. The Available Transmission System Capability Reliability Standard (MOD–001–1) serves as an ''umbrella'' Reliability Standard that requires each applicable entity to select and implement one or more of the three available transfer capability methodologies found in MOD–028–1, MOD–029–1, or MOD–030–2. MOD–004–1 and MOD–008–1 provide for the calculation of capacity benefit margin and transmission reliability margin, which are inputs into the available transfer capability calculation. NERC states that its filing wholly addresses eight of the 24 Reliability Standards that the Commission did not approve in Order No. 693 because further information was needed.

15. NERC contends that the Reliability Standards will have no undue negative effect on competition, nor will they unreasonably restrict available transfer capability on the Bulk-Power System

[19] FPA section 215(d)(5). 16 U.S.C. 824o(d)(5).

[20] Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 1029.

[21] *Id.* P 1030.

[22] Order No. 693, FERC Stats. & Regs. ¶ 31,242.

[23] *Id.* P 1010.

[24] *Id.*

[25] *Id.* P 1029–30; *see also* Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 207.

[26] Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 287–303. Some of these Reliability Standards required the regional reliability organizations to develop criteria for use by users, owners or operators within each region. The Commission set aside such Reliability Standards and directed NERC to provide additional details prior to considering them for approval. *Id.* P 287–303.

[27] The Reliability Standards were originally due on December 10, 2007. *See* Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 223. NERC requested additional time to develop the Reliability Standards in order to address concerns raised in its stakeholder process. *See* NERC November 21, 2007 Request for Extension of Time, Docket No. RM05–17–000, *et al.,* at 7. The Commission ultimately granted three requests for extension of time, extending NERC's deadline by over seven months, so that NERC could develop the Reliability Standards proposed here.

[28] NERC designates the version number of a Reliability Standard as the last digit of the Reliability Standard number. Therefore, version zero Reliability Standards end with ''–0'' and version one Reliability Standards end with ''–1.''

[29] The MOD Reliability Standards are not codified in the CFR and are not attached to the Final Rule. They are, however, available on the Commission's eLibrary document retrieval system and on the ERO's Web site, *http://www.nerc.com.*

beyond any restriction necessary for reliability and do not limit use of the Bulk-Power System in an unduly preferential manner. NERC contends that the increased rigor and transparency introduced in the development of available transfer capability and available flowgate capability calculations serve to mitigate the potential for undue advantages of one competitor over another. Under the Reliability Standards, applicable entities are prohibited from making transmission capability available on a more conservative basis for commercial purposes than for either planning for native load or use in actual operations, thereby mitigating the potential for differing treatment of native load customers and transmission service customers. NERC states that data exchange, which has been heretofore voluntary, is now mandatory and it is required that the data be used in the available transfer capability/available flowgate capability calculations. None of these requirements exist in the current available transfer capability-related Reliability Standards. NERC contends that these improvements help the Commission achieve many of the primary objectives of Order No. 890 regarding transparency, standardization and consistency in available transfer capability calculations.

16. NERC states that all three methodology Reliability Standards (MOD–028–1, MOD–029–1, and MOD–030–2) share fundamental equations that, while mathematically equivalent, are written in slightly different forms. As a result, the manner of determining the components varies between methodologies. The employment of any two methodologies, given the same inputs, may produce similar, but not identical, results. As noted by NERC there are fundamental differences in the proposed methodologies that can keep them from producing identical results. For example, the rated system path methodology does not use the same frequent simulations of power flow used by the other two methodologies. NERC states that the rated system path methodology therefore will rarely generate numbers that identically match those determined by an entity using the other two methodologies.

A. Coordination With Business Practice Standards

17. NERC states that it has worked closely and collaboratively with NAESB, conducting numerous joint meetings and conference calls, to develop the MOD Reliability Standards and related NAESB business-practice standards.[30] NERC states that the focus of the MOD Reliability Standards is to address only the reliability aspects of available transfer capability and available flowgate capability, not commercial aspects, except to the extent that commercial system availability closely matches actual remaining system capability. The associated NAESB business practice standards are intended to focus on the competitive aspects of these processes. Through implementation of these Reliability Standards, access to the grid may indirectly be restricted, but NERC states that NAESB business practices and Commission orders related to these Reliability Standards ensure that any limitation will be applied in a manner that ensures open access and promotes competition.

18. According to NERC, it and NAESB have coordinated the development of these business practices and the Reliability Standards to ensure that there are no duplications or double counting between the business practice standards and the Reliability Standards. They intend to continue to coordinate as necessary so that the available transfer capability-related Reliability Standards are compatible and consistent.

B. Available Transmission System Capability, MOD–001–1

19. NERC proposes the Available Transmission System Capability Reliability Standard (MOD–001–1) as part of a set of Reliability Standards which are designed to work together to support a common reliability goal: To ensure that transmission service providers maintain awareness of available system capability and future flows on their own systems as well as those of their neighbors. NERC states that, historically, differences in implementation of available transfer capability methodologies and a lack of coordination between transmission service providers have resulted in cases where available transfer capability has been overestimated. As a result, systems have been oversold, resulting in potential or actual violations of system operating limits and interconnection reliability operating limits. NERC states that MOD–001–1 is the foundational Reliability Standard that obliges entities to select a methodology and then calculate available transfer capability or available flowgate capability using that methodology. NERC contends that such selection ensures that the determination of available transfer capability is accurate and consistent across North America and that the transmission system is neither oversubscribed nor underutilized.

20. NERC states that, unlike the current set of voluntary available transfer capability standards, MOD–001–1 requires adherence to a specific documented and transparent methodology. NERC states that it requires applicable entities to calculate available transfer capability on a consistent schedule and for specific timeframes. According to NERC, MOD–001–1 requires users, owners and operators to disclose counterflow assumptions and outage processing rules to other reliability entities. NERC states that this Reliability Standard prohibits applicable entities from making transmission capability available on a more conservative basis for commercial purposes for either planning for native load or use in actual operations. NERC's MOD–001–1 also requires entities, for the first time, to exchange and use available transfer capability data. NERC states that the Reliability Standard reflects industry's consensus best practices for determining available transfer capability.

21. MOD–001–1 includes nine requirements, which apply to all transmission service providers and transmission operators. To ensure consistency of enforcement, NERC states that each requirement is supported by a measure that identifies what is required and how the requirement will be enforced.

22. Under Requirement R1, a transmission operator must select one of three methodologies for calculating available transfer capability or available flowgate capability for each available transfer capability path for each time frame (hourly, daily or monthly) for the facilities in its area. As stated above, the three methodologies are: The area interchange methodology, the rated system path methodology, and the flowgate methodology.

23. Several requirements within this MOD–001–1 address the calculation of available transfer capability or available flowgate capability. Requirement R2 requires each transmission service provider to calculate available transfer capability or available flowgate capability values hourly for the next 48 hours, daily for the next 31 calendar days and monthly for the next 12 months. Requirement R6 requires each transmission operator in its calculation of total transfer capability or total flowgate capability to use assumptions no more limiting than those used in its

[30] As noted above, the Commission addresses the NAESB business practices in a Final Rule issued concurrently in Docket No. RM05–5–013. *See Standards for Business Practices and Communication Protocols for Public Utilities,* Order No. 676–E, 129 FERC ¶ 61,162 (2009).

planning of operations. NERC contends that, consistent with the requirements of Order No. 890 and related directives of Order No. 693, Requirement R6 will minimize the differences between total transfer capability and total flowgate capability for transmission and transfer capability used in native load and reliability assessment studies.[31] Similarly, Requirement R7 requires each transmission service provider, in its calculation of available transfer capability or available flowgate capability, to use assumptions no more limiting than those used in its planning of operations. NERC contends that this requirement addresses the Commission's directive in Order No. 693 for the ERO to modify the available transfer capability Reliability Standards to include a requirement that the assumptions used in available transfer capability and available flowgate capability calculations be consistent with those used for planning the expansion or operation of the Bulk-Power System to the maximum extent possible.[32] Requirement R8 requires each transmission service provider to recalculate available transfer capability at a certain specified interval (hourly, daily, monthly) unless the input values specified in the available transfer capability calculation have not changed. NERC contends that Requirement R8 satisfies the Commission's directive to calculate available transfer capability on a consistent time interval.[33]

24. MOD–001–1 also includes several record keeping and information sharing requirements for transmission service providers. Requirement R3 requires each transmission service provider to keep an available transfer capability implementation document that explains the implementation of its chosen methodology(ies), its use of counterflows, the identities of entities with which it exchanges information for coordination purposes, any capacity allocation processes, and the manner in which it considers outages. Requirement R4 requires transmission service providers to keep specific reliability entities advised regarding changes to the available transfer capability implementation document.[34] Requirement R5 requires the transmission service provider to make the available transfer capability implementation document available to those same reliability entities.[35] Finally, Requirement R9 allows a transmission service provider thirty calendar days to begin to respond to a request from any other transmission service provider, planning coordinator, reliability coordinator or transmission operator for certain data to be used in the requestor's available transfer capability or available flowgate capability calculations.

25. In Order No. 693, the Commission directed the ERO to develop modifications to the available transfer capability Reliability Standards to include a requirement that applicable entities make available assumptions and contingencies underlying available transfer capability and total transfer capability calculations. NERC contends that this Reliability Standard addresses this issue by requiring disclosure in the available transfer capability implementation document under Requirement R3.1 and part of the data exchange required by Requirement R9. NERC states that it has agreed with NAESB that requirements for posting information are more appropriately addressed through the NAESB process. Accordingly, NERC states that NAESB will be addressing the requirements associated with posting this information, instead of NERC.

C. Capacity Benefit Margin Methodology, MOD–004–1

26. The Capacity Benefit Margin Methodology Reliability Standard (MOD–004–1) provides for the calculation of capacity benefit margin. NERC defines capacity benefit margin as the amount of firm transmission capability set aside by the transmission service provider for load-serving entities, whose loads are located on that transmission service provider's system, to enable access by the load-serving entities to generation from interconnected systems to meet generation reliability requirements.[36] The purpose of this Reliability Standard is to promote the consistent and reliable calculation, verification, setting aside, and use of capacity benefit margin to support analysis and system operations. NERC states that setting aside of capacity benefit margin for a load-serving entity allows that entity to reduce its installed generating capacity below that which may otherwise have been necessary without interconnections to meet its generation reliability requirements. NERC states that the transmission transfer capability preserved as capacity benefit margin is intended to be used by the load-serving entities only in times of emergency generation deficiencies.

27. Reliability Standard MOD–004–1 applies to transmission service providers, transmission planners, load-serving entities, resource planners and balancing authorities. As discussed more fully below, NERC states that it does not specify a particular methodology for calculating capacity benefit margin, but rather improves transparency by requiring adherence to specific documented and transparent methodology to ensure consistent and reliable calculation, verification, preservation and use of capacity benefit margin.

28. To improve consistency and transparency in the calculation of capacity benefit margin, the Reliability Standard imposes twelve requirements on entities electing to use a capacity benefit margin. Requirement R1 requires the transmission service provider that maintains capacity benefit margin to prepare and keep current a capacity benefit margin implementation document that includes at a minimum: (1) The process through which a load-serving entity within a balancing authority associated with the transmission service provider, or the resource planner associated with that balancing authority area, may ensure that its need for transmission capacity to be set aside as capacity benefit margin will be reviewed and accommodated by the transmission service provider to the extent transmission capacity is available; (2) the procedure and assumptions for establishing capacity benefit margin for each available transfer capability path or flowgate; and (3) the procedure for a load-serving entity or balancing authority to use transmission capacity set aside as capacity benefit margin, including the manner in which the transmission service provider will manage situations where the requested use of capacity benefit margin exceeds the amount of capacity benefit margin available.

29. Requirement R2 requires the transmission service provider to make its current capacity benefit margin implementation document available to the transmission operators, transmission service providers, reliability

[31] *See* Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 237; Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 1051.

[32] Order No. 693, FERC Stats. & Regs. ¶ 1,242 at P 1057; *see also* Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 292.

[33] *See* Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 301; Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 1057.

[34] These include: each planning coordinator, reliability coordinator, and transmission operator associated with the transmission service provider's area; and each planning coordinator, reliability coordinator, and transmission service provider adjacent to the transmission service provider's area.

[35] Although the Reliability Standards only require the transmission service provider to make the available transfer capability implementation document available to certain reliability entities, the NAESB standard on OASIS posting requirements (Standard 001–13.1.5) requires transmission service providers to provide a link to the document on OASIS.

[36] *See* NERC Glossary.

coordinators, transmission planners, resource planners, and planning coordinators that are within or adjacent to the transmission service provider's area, and to the load-serving entities and balancing authorities within the transmission service providers area, and notify those entities of any changes to the capacity benefit margin implementation document prior to the effective date of the change.

30. Requirements R3 and R4 require each load-serving entity and resource planner to determine the need for transmission capacity to be set aside as capacity benefit margin for imports into a balancing authority by using one or more of the following to determine the generation capability import requirement: [37] loss of load expectation studies, loss of load probability studies, deterministic risk-analysis studies, and reserve margin or resource adequacy requirements established by other entities, such as municipalities, state commissions, regional transmission organizations, independent system operators, regional reliability organizations, or regional entities.

31. Requirement R5 requires the transmission service provider to establish at least every 13 months a capacity benefit margin value for each available transfer capability path or flowgate to be used for available transfer capability or available flowgate capability during the 13 full calendar months (months 2–14) following the current month (the month in which the transmission service provider is establishing the capacity benefit margin values). Similarly, Requirement R6 requires the transmission planner to establish a capacity benefit margin value for each available transfer capability path or flowgate to be used in planning during each of the full calendar years two through ten following the current year (the year in which the transmission planner is establishing the capacity benefit margin values). All values must reflect consideration of each of the following, if available: (1) Any studies performed by load-serving entities or resource planners pursuant to Requirement R3 for loads within the transmission service provider's area; or (2) any reserve margin or resource adequacy requirements for loads within the transmission service provider's area established by other entities, such as municipalities, state commissions, regional transmission organizations, independent system operators, regional reliability organizations, or regional entities. Once determined, the capacity benefit margin values will be allocated along available transfer capability paths based on the expected import paths or source regions provided by load-serving entities or resource planners. Capacity benefit margin values for flowgates will be allocated based on the expected import paths or source regions provided by load-serving entities or resource planners and the distribution factors associated with those paths or regions, as determined by the transmission service provider.

32. Requirements R7 and R8 require the transmission service provider and the transmission planner to notify all load-serving entities and resource planners that determined they had a need for capacity benefit margin of the amount, or the amount planned, of capacity benefit margin set aside, within 31 calendar days after the establishment of capacity benefit margin.

33. Requirement R9 requires the transmission service provider that maintains capacity benefit margin and the transmission planner to provide, subject to confidentiality and security requirements, copies of the applicable supporting data, including any models, used for determining capacity benefit margin or allocating capacity benefit margin over each available transfer capability path or flowgate to each of the associated transmission operators and to any transmission service provider, reliability coordinator, transmission planner, resource planner, or planning coordinator within 30 calendar days of their making a request for the data.

34. Requirement R10 requires the load-serving entity or balancing authority to request to import energy over firm transfer capability set aside as capacity benefit margin only when experiencing a declared level 2 or higher NERC energy emergency alert.[38]

35. When reviewing an arranged interchange service request using capacity benefit margin, Requirement R11 requires all balancing authorities and transmission service providers to waive, within the bounds of reliable operation, any real-time timing and ramping requirements.

36. Requirement R12 requires all transmission service providers maintaining capacity benefit margin to approve, within the bounds of reliable operation, any arranged interchange using capacity benefit margin that is submitted by an ''energy deficient entity'' [39] under an energy emergency alert level 2 if the capacity benefit margin is available, the emergency is declared within the balancing authority area of the energy deficient entity, and the load of the energy deficient entity is located within the transmission service provider's area.

37. NERC states that MOD–004–1 complies with the requirements of Order No. 890 and related directives of Order No. 693 because it sets criteria that allow load-serving entities to request transfer capability to be set aside in the form of capacity benefit margin in a consistent and transparent manner. Consistent with the Commission's direction, the Reliability Standard provides an approach for determining capacity benefit margin that is flexible and does not mandate a particular methodology.[40] NERC supports this approach because various parts of the country have already developed robust methodologies for determining capacity benefit margin. NERC states that Requirements R3 and R4 allow load-serving entities and resource planners to perform specific studies to determine their need for capacity benefit margin. By specifying the types of studies load-serving entities or resource planners must perform, NERC contends that MOD–004–1 ensures that capacity benefit margin and transmission reliability margin are not used for the same purpose.[41] In response to the Commission's transparency requirement,[42] NERC states that Requirement R9 ensures that capacity benefit margin studies are made available to the appropriate reliability entities for their review and analysis. With regard to public disclosure, NERC states that it has agreed with NAESB that requirements for posting information are more appropriately addressed through the NAESB process.

38. Requirements R5 and R6 require that the transmission service provider and transmission planner utilize the information contained in the studies if it has been provided to them when establishing capacity benefit margin values and mandate the re-evaluation of

[37] NERC defines the generation capability import requirement as the amount of generation capability from external sources identified by a load-serving entity or resource planner to meet its generation reliability or resource adequacy requirement as an alternative to internal resources.

[38] Under Reliability Standard EOP–002–2 Reliability Coordinators initiate an energy emergency alert when a balancing authority within its control area experiences a potential or actual energy emergency. NERC has established three levels of energy emergency alerts (one through three) to clarify the severity of the potential or actual energy emergency.

[39] Energy deficient entities are defined by NERC in the Capacity and Energy Emergencies Reliability Standard. *See* EOP–002–2, Attachment 1.

[40] *Citing* Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 1078; *see also* Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 257.

[41] *Citing* Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 1105.

[42] *Citing id.* P 1077.

capacity benefit margin at least once every thirteen months.[43] NERC states that, consistent with Order Nos. 890 and 693, Requirements R5 and R6 also require allocation of capacity benefit margin based on the available transfer methodology chosen under MOD–001–1.[44] NERC states that Requirements R10, R11 and R12 specify the manner in which capacity benefit margin is to be used.[45] NERC states that any additional requirements specified by the transmission service provider must be identified in the capacity benefit margin implementation document, as mandated in Requirement R1.3.

39. In response to the requirement that capacity benefit margins values be verifiable,[46] NERC states that Requirements R5, R6 and R9 ensure that the studies used to establish a need for capacity benefit margin are made available to any of the reliability entities specified in Requirement R9 that request them. NERC explains that the Reliability Standard does not mandate the verification of amounts of capacity benefit margin requested by the transmission service provider because it would place a functional entity (either the transmission service provider or transmission planner) in the position of having to judge the quality of each request, which could create conflicts of interest or potentially result in liability for that entity. Rather than mandate any particular approach for validation, NERC states that Requirements R3 and R4 mandate the specific kinds of studies to be performed and supporting information that is to be maintained when determining the underlying need for capacity benefit margin. To the extent that entities do not use these methods or maintain this supporting information, NERC states that they will be in violation of the Reliability Standard.

40. In response to the Commission's call for clarity in the process for requesting capacity benefit margin,[47] NERC states that Requirement R1.1 requires the transmission service provider to explain the process by which load-serving entities and resource planners may ensure that their need for transmission capacity to be set aside as capacity benefit margin is reviewed and accommodated by the transmission service provider to the extent transmission capacity is available. Requirement R1.3 requires the transmission service provider to describe the procedure for load-serving entities and resource planners to use transmission capacity that has been set aside as capacity benefit margin. If the requested use of capacity benefit margin exceeds the amount of capacity benefit margin available, Requirement R1.3 also requires a description of how the transmission service provider will manage such situations. In addition, NERC states that Requirements R7 and R8 mandate that the transmission service provider notify load-serving entities and resource planners that determined they had a need for capacity benefit margin of the amount of capacity benefit margin set aside, so that they may make informed decisions about how to proceed if their full request for capacity benefit margin could not be accommodated.

D. Transmission Reliability Margin Methodology, MOD–008–1

41. The Transmission Reliability Margin Methodology Reliability Standard (MOD–008–1) provides for the calculation of transmission reliability margin. Transmission reliability margin is transmission transfer capability set aside to mitigate risks to operations, such as deviations in dispatch, load forecast, outages, and similar such conditions.[48] It is distinctly different from capacity benefit margin, which is transmission transfer capability set aside to allow for the import of generation upon the occurrence of a generation capacity deficiency. MOD–008–1 describes the reliability aspects of determining and maintaining a transmission reliability margin and the components of uncertainty that may be considered when making that calculation. The purpose of this Reliability Standard is to promote the consistent and reliable calculation, verification, preservation, and use of transmission reliability margin to support analysis and system operations.

42. Reliability Standard MOD–008–1 applies only to transmission operators that have elected to keep a transmission reliability margin. As discussed more fully in the discussion section below, NERC states that the Reliability Standard does not specify one approach for calculating transmission reliability margin, but rather improves transparency by providing the key requirements and items that must be contained in any transmission reliability margin methodology.

43. To improve the transparency of transmission reliability margin calculations, the Reliability Standard imposes five requirements on transmission service providers electing to keep a transmission reliability margin. Requirement R1 provides that a transmission operator must keep a transmission reliability margin implementation document that explains how specific risks such as aggregate load forecast uncertainty, load distribution uncertainty, and forecast uncertainty in transmission system topology[49] are accounted for in the transmission reliability margin, how transmission reliability margin is allocated, and how transmission reliability margin is determined for various time frames.

44. Requirement R2 allows a transmission operator to account only for the risks identified in Requirement R1 in transmission reliability margin, and prohibits the transmission operator from incorporating risks that are addressed in capacity benefit margin. It allows reserve sharing to be included in transmission reliability margin.

45. Requirement R3 requires each applicable entity to make the transmission reliability margin implementation document and associated information available to the following reliability entities if requested: Transmission service provider, reliability coordinator, planning coordinator, transmission planner, and transmission operator.

46. Requirement R4 provides that each applicable transmission operator must determine the transmission reliability margin value per the methods described in the transmission reliability margin implementation document at least once every thirteen months. Finally, Requirement R5 states that each applicable transmission operator must provide that transmission reliability margin value to its transmission service providers and transmission planners no more than seven days after it has been determined.

47. NERC states that MOD–008–1 complies with Order No. 890 by specifying the critical areas of analysis

[43] *Citing* Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 358. NERC states that it chose thirteen months to ensure enough flexibility for a yearly update without being so prescriptive as to require it on a specific day.

[44] *Citing id.* P 257; Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 1082.

[45] *Citing* Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 256–7.

[46] Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 1077.

[47] *Id.* P 1081.

[48] *See* NERC Glossary, *available at: http://www.nerc.com/docs/standards/rs/Glossary_2009April20.pdf.*

[49] This includes, but is not limited to: Forced or unplanned outages and maintenance outages; allowances for parallel path (loop flow) impacts; allowances for simultaneous path interactions; variations in generation dispatch (including, but not limited to, forced or unplanned outages, maintenance outages and location of future generation); short-term system operator response (operating reserve actions); reserve sharing requirements; and inertial response and frequency bias.

required for transmission reliability margin.[50] Further, it states that it has specified the appropriate uses of transmission reliability margin in Requirement R1 and prohibited the use of other values and double counting in Requirement R1. In addition, it maintains that MOD–008–1 complies with Order No. 693 by imposing clear requirements for making available documents supporting the transmission reliability margin determination through Requirements R1 and R3.

48. In response to the requirement to expand the applicability of the transmission reliability margin Reliability Standard to planning authorities and reliability coordinators,[51] NERC states that the drafting team was not able to identify any requirements for these entities, based on the current drafting of the Reliability Standard. Therefore, these entities are not included in the proposed Reliability Standard. NERC states that, until such time as the transmission reliability margin methodology becomes more detailed, there does not seem to be any measurable action that can be imposed on the planning coordinator or reliability coordinator.

49. In response to the Commission's statement that it would not require transfer capability that is set aside as transmission reliability margin to be sold on a non-firm basis,[52] NERC states that it has included this requirement in each of the three methodologies as a part of firm and non-firm equations. NERC states that, because some of the uncertainties included in the transmission reliability margin may be reduced or eliminated as one approaches real time, the non-firm equations allow for the partial release of transmission reliability margin.

50. NERC contends that choosing a ''best'' approach to transmission reliability margin calculation would require a much more thorough technical effort. NERC therefore requests that the Commission provide additional guidance on this topic regarding its priority and a determination whether or not such an effort should be included in NERC's annual planning process.

E. Three Methodologies for Calculating Available Transfer Capability

51. In Order No. 890, the Commission did not require a uniform methodology for calculating available transfer capability. The Commission noted that NERC was developing Reliability Standards for three available transfer capability calculation methodologies and concluded that, if all of the available transfer capability components and certain data inputs and assumptions are consistent, the three available transfer capability calculation methodologies being developed by NERC will produce predictable and sufficiently accurate, consistent, equivalent and replicable results.[53] Consistent with Order No. 890, NERC developed three methodologies for calculating available transfer capability as detailed in the following Reliability Standards: MOD–028–1, MOD–029–1 and MOD–030–2. NERC contends that these three methodologies meet the requirements established by the Commission in Order No. 890, as well as those established in Order No. 693.

52. NERC asserts that the three methodologies are a significant improvement over the existing available transfer capability related requirements. While current MOD–001–0 is essentially a ''fill-in-the-blank'' Reliability Standard,[54] the methodologies replace the original fill-in-the blank standard by specifying in detail how total transfer capability is to be determined—from modeling requirements, to the simulation of dispatch to determine native load impacts, to the treatment of reservations and to the incorporation of neighboring data. According to NERC, MOD–001–1 specifies how existing transmission commitments and available transfer capability are to be determined in detail and clearly describes the treatment of capacity benefit margin and transmission reliability margin in the available transfer capability equations. Thus, NERC contends, these Reliability Standards reduce the potential for seams discrepancies and improve the wide-area understanding of the Bulk-Power System on a forward-looking basis. NERC states that, by promoting consistency, standardization and transparency, they directly support and improve the reliability of the Bulk-Power System and help achieve the Commission's objectives stated in Order No. 890.

1. Area Interchange Methodology, MOD–028–1

53. NERC states that the area interchange methodology is characterized by determination of incremental transfer capability via simulation, from which total transfer capability can be mathematically derived. Capacity benefit margin, transmission reliability margin, and existing transmission commitments are subtracted from the total transfer capability, and postbacks and counterflows are added, to derive available transfer capability. NERC also states that, under the area interchange methodology, total transfer capability results are generally reported on an area to area basis.

54. MOD–028–1 describes the area interchange methodology (previously referred to as the network response available transfer capability methodology) for determining available transfer capability. NERC intends to use the Area Interchange Methodology Reliability Standard to increase consistency and reliability in the development and documentation of transfer capability calculation for short-term use performed by entities using the area interchange methodology to support analysis and system operations.

55. This Reliability Standard applies only to transmission operators and transmission service providers that elect to implement this particular methodology as part of their compliance with MOD–001–1, Requirement R1. The proposed Reliability Standard consists of eleven requirements. Requirement R1 provides the additional information that a transmission service provider using the area interchange methodology must include in its available transfer capability implementation document. The document must include information describing how the selected methodology has been implemented, in such detail that, given the same information used by the transmission operator, the results of the total transfer capability calculations can be validated. The document must also include a description of the manner in which the transmission operator will account for interchange schedules in the calculation of total transfer capability; any contractual obligations for allocation of total transfer capability; a description of the manner in which contingencies are identified for use in the total transfer capability process; and information on how sources and sinks for transmission service are accounted for in available transfer capability calculations.

56. Pursuant to Requirement R2, each transmission operator must calculate

[50] NERC Filing at 32 (citing Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 273).

[51] Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 1126.

[52] *See* Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 273.

[53] *Id.* P 210.

[54] A fill-in-the-blank Reliability Standard requires the regional entities to develop criteria for use by users, owners or operators within each region. In Order No. 693, the Commission held 24 Reliability Standards (mainly fill-in-the-blank standards) as pending until further information was provided on each standard and requires users, owners and operators to follow these pending standards as ''good utility practice'' pending their approval by the Commission.

total transfer capability using a model that meets the scope specified in the requirement and includes rating information specified by generator owners and transmission owners whose equipment is represented in the model.

57. Requirement R3 details the information the transmission operator must include in its determination of total transfer capability for the on-peak and off-peak intra-day and next day time periods, as well as days two through 31 and for months two through 13.[55] Requirement R4 requires each transmission operator to determine total transfer capability while modeling contingencies and reservations consistently, and respect any contractual allocations of total transfer capability.

58. Requirement R5 provides that each transmission operator must determine total transfer capability on a periodic basis (as specified in the requirement) or upon certain operating conditions significantly affecting bulk electric system topology.

59. Requirement R6 provides the detailed process by which each transmission operator must establish total transfer capability, which it must communicate to the transmission service provider within the time frames specified in Requirement R7.

60. Requirements R8 through R11 specify the formulas and provide descriptions of the variables to be used to calculate firm and non-firm existing transmission commitments and firm and non-firm available transfer capability.

2. Rated System Path Methodology, MOD–029–1

61. NERC states that the rated system path methodology is characterized by an initial total transfer capability, determined via simulation. As with the area interchange methodology, capacity benefit margin, transmission reliability margin, and existing transmission commitments are subtracted from the total transfer capability, and postbacks and counterflows are added, to derive available transfer capability. NERC also states that, under the rated system path methodology, total transfer capability results are generally reported as specific transmission path capabilities.

62. MOD–029–1 describes the rated system path methodology for determining available transfer capability. NERC intends to use this Reliability Standard to increase consistency and reliability in the development and documentation of transfer capability calculations for short-term use performed by entities using the rated system path methodology to support analysis and system operations.

63. This Reliability Standard applies only to transmission operators and transmission service providers that have elected to implement rated system path methodology as part of their compliance with MOD–001–1, Requirement R1. To implement this calculation, this Reliability Standard consists of eight requirements. Under Requirement R1, a transmission operator must calculate total transfer capability using a model that meets the scope and criteria specified in the requirement. Requirement R2 lists a detailed process by which the transmission operator must establish total transfer capability. Pursuant to Requirement R3, the transmission operator must establish total transfer capability as the lesser of the system operating limit[56] or the value determined in Requirement R2. The transmission operator must then provide a transmission service provider with the appropriate total transfer capability values and study report within seven days of finalization of the study report to be prepared under in Requirement R4.

64. Requirements R5 through R8 provide that each applicable transmission service provider must calculate firm and non-firm existing transmission commitments and firm and non-firm available transfer capability using a specified formula and also provides detailed descriptions of the variables to be used.

3. Flowgate Methodology, MOD–030–2

65. NERC states that the flowgate methodology is characterized by identification of key facilities as flowgates. Total flowgate capabilities are determined based on facility ratings and voltage and stability limits. The impacts of existing transmission commitments are determined by simulation. To determine the available flowgate commitments, the transmission service provider or operator must subtract the impacts of existing transmission commitments, capacity benefit margin, and transmission reliability margin, and add the impacts of postbacks and counterflows. Available flowgate capability can be used to determine available transfer capability.

66. MOD–030–2 describes the flowgate methodology for determining available transfer capability. NERC states that the purpose of the Flowgate Methodology Reliability Standard is to increase consistency and reliability in the development and documentation of transfer capability calculations for short-term use performed by entities using the flowgate methodology to support analysis and system operations.

67. This Reliability Standard applies only to transmission operators and transmission service providers that have elected to implement this particular methodology as part of their compliance with MOD–001–2. As proposed, the Flowgate Methodology consists of eleven requirements. Requirement R1 states that a transmission service provider implementing this methodology must include the following information in its available transfer capability implementation document in addition to that already required in the Available Transmission System Capability Reliability Standard (MOD–001–1): The criteria used by the transmission operator to identify sets of transmission facilities as flowgates that are to be considered in available flowgate capability calculations, and information on how sources and sinks for transmission service are accounted for in available flowgate capability calculations.

68. Under Requirement R2, each applicable transmission operator must determine and manage the flowgates used in the methodology based on the criteria listed in the requirement, establish its total flowgate capability based on the criteria listed in the requirement, and provide total flowgate capability to the transmission service provider within seven days of their determination. To achieve consistency in each component of the available transfer capability calculation, the Commission, in Order No. 890, directed public utilities, working through NERC, to develop an available flowgate capability definition and requirements used to identify a particular set of transmission facilities in a flowgate.[57] As part of the development of the Flowgate Methodology, NERC states that the Reliability Standard drafting team developed a definition of available flowgate capability. In addition, NERC states that Requirement R2 of this Reliability Standard contains a list of minimum characteristics that are to be used to identify a particular set of transmission facilities as a flowgate.

[55] This information includes: expected generation and transmission outages, additions, and retirements; load forecasts; and unit commitment and dispatch order.

[56] The NERC Glossary defines a system operating limit as the value (such as MW, MVar, Amperes, Frequency or Volts) that satisfies the most limiting of the prescribed operating criteria for a specified system configuration to ensure operation within acceptable reliability criteria.

[57] Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 313.

69. Requirement R3 requires the transmission operator to provide the transmission service provider with a transmission model that meets a specified criteria and Requirement R4 provides that the transmission service provider must evaluate reservations consistently when determining available flowgate capability. When determining available flowgate capability, Requirement R5 provides that each transmission service provider must use the models given to it as described in Requirement R3, include appropriate outages, and use the available flowgate capability on external flowgates as provided by the transmission service provider calculating available flowgate capability for those flowgates.

70. Requirements R6 and R7 require each transmission service provider to calculate the impact of firm and non-firm existing transmission commitments using a specified process. The transmission service provider must calculate firm and non-firm available flowgate capability using the formula and detailed specification of the variables found in Requirements R8 and R9.

71. Under Requirement R10, each transmission service provider shall recalculate available flowgate capability at a certain specified interval (hourly once per hour, daily once per day, monthly once per week) unless the input values specified in the available flowgate capability calculation have not changed. NERC contends that this requirement satisfies the requirement in Order No. 890 and Order No. 693 that transmission service providers recalculate available transfer capability on a consistent time interval. Finally, Requirement R11 provides the formula and variables that a transmission service provider must use if it desires to convert available flowgate capability to available transfer capability.

F. Implementation Plan

72. NERC requests that the Available Transmission System Capability Reliability Standard and the three methodology Reliability Standards become effective the first day of the first quarter no sooner than one calendar year after approval of all of these four Reliability Standards by all appropriate regulatory authorities where approval is required or is otherwise effective in those jurisdictions where approval is not explicitly required. NERC notes that Requirement R9 of the Available Transmission System Capability Reliability Standard (MOD–001–1) establishes the requirement for entities to develop certain information and the three methodology Reliability Standards rely on this information from neighboring reliability entities for use in the development of its available transfer capability and available flowgate capability values. Due to this reliance on the MOD–001–1 information, NERC concludes that none of the methodology Reliability Standards can be effectively implemented unless and until MOD–001–1 has been implemented by all entities in all jurisdictions.

73. NERC states that, although some entities may already be implementing the requirements in the Reliability Standards, many others are not, especially with regard to the data exchange requirements listed in Requirement R9 of MOD–001–1. Accordingly, software changes, associated testing, and possible tariff filings will be required to comply with the proposed Reliability Standards. Therefore, NERC maintains that a minimum of one year from regulatory approval should be allowed for entities to comply.

74. NERC requests that each of the Capacity Benefit Margin (MOD–004–1) and Transmission Reliability Margin (MOD–008–1) Reliability Standards require compliance on the first day of the first quarter no sooner than one calendar year after approval of the Reliability Standard by appropriate regulatory authorities where approval is required or, where approval is not explicitly required, when the Reliability Standard is otherwise effective.[58] According to NERC, unlike the other four proposed Reliability Standards included in this filing, the Transmission Reliability Margin Reliability Standard replaces the existing Reliability Standard MOD–008–0 and the Capacity Benefit Margin Reliability Standard replaces MOD–004–0. As such, they do not require coordinated implementation, as entities may rely on the previous version of the Reliability Standards if any delay in implementing the Reliability Standards occurs. NERC states that, although many entities already use transmission reliability margin and capacity benefit margin, compliance with these Reliability Standards may require software changes, software regression testing, and possible tariff changes. To accommodate these needs, NERC believes a one-year implementation period is appropriate.

[58] In jurisdictions where regulatory approval is not required, the MOD–004–1 and MOD–008–1 will become effective on the first day of the first calendar quarter that is twelve months after the date of approval by the NERC Board of Trustees.

III. Discussion

A. Approval, Implementation and Audit of the MOD Reliability Standards

NOPR Proposal

75. In the NOPR, the Commission proposed to approve the Reliability Standards filed by NERC in this proceeding as just, reasonable, not unduly discriminatory or preferential, and in the public interest.[59] The Commission stated that these Reliability Standards represent a step forward in eliminating the broad discretion previously afforded transmission service providers in the calculation of available transfer capability.

76. The Available Transmission System Capability Reliability Standard (MOD–001–1) serves as an ''umbrella'' Reliability Standard that requires each applicable entity to select and implement one or more of the three available transfer capability methodologies found in MOD–028–1, MOD–029–1, or MOD–030–2. Reliability Standards MOD–004–1 and MOD–008–1 provide for the calculation of capacity benefit margin and transmission reliability margin, which are inputs into the available transfer capability calculation. Together, these Reliability Standards require transmission service providers and transmission operators to prepare and keep current implementation documents that contain certain information specified in the Reliability Standards. The available transfer capability implementation documents must describe the available transfer capability methodology in such detail that the results of their calculations can be validated when given the same information used by the transmission service provider or transmission operator.[60]

77. The Commission expressed concern in the NOPR that the proposed Reliability Standards could be implemented by a particular transmission service provider or transmission operator in a way that enables them to unduly discriminate in the provision of open access transmission service. The Commission observed that, although the Reliability Standards require transmission service providers to include certain minimum information in each of the implementation documents, transmission service providers are also permitted to include additional, undefined parameters and assumptions in those documents.[61] The Commission

[59] NOPR, FERC Stats. & Regs. ¶ 32,641 at P 75.

[60] MOD–001–1, Requirement R3.

[61] NOPR, FERC Stats. & Regs. ¶ 32,641 at P 81.

explained that these documents could include criteria that are themselves not sufficiently transparent to allow the Commission and others to determine whether they have been consistently applied by the transmission service provider in particular circumstances. As noted by the Commission, this discretion appears in the three available transfer capability methodologies (MOD–028–1, MOD–029–1, an MOD–030–2), as well as the Reliability Standards governing the calculation of capacity benefit margin (MOD–004–1) and transmission reliability margin (MOD–008–1).

78. The Commission clarified in the NOPR that it is appropriate for transmission service providers to retain some level of discretion in the calculation of available transfer capability. Requiring absolute uniformity in criteria and assumptions across all transmission service providers would preclude transmission service providers from calculating available transfer capability in a way that accommodates the operation of their particular systems. The Commission explained that the Reliability Standards need not be so specific that they address every unique system difference or differences in risk assumptions when modeling expected flows. Instead, each transmission service provider should retain some discretion to reflect unique system conditions or modeling assumptions in its available transmission capability methodology.[62] The Commission stated that any such system conditions or modeling assumptions, however, must be made sufficiently transparent and be implemented consistently for all transmission customers.

79. In order to ensure adequate transparency, the Commission proposed to direct the ERO to conduct a review of the additional parameters and assumptions included by each transmission service provider in its available transfer capability, capacity benefit margin, and transmission reliability margin implementation documents. In its audit, NERC would identify any parameters and assumptions that are not sufficiently specific or transparent to allow the Commission and others to replicate and verify the results of the transmission service provider's calculation of available transfer capability or available flowgate capability, capacity benefit margin, and transmission reliability margin. Upon review of NERC's analysis, the Commission indicated that it may direct the ERO to develop a modification to MOD–001–1, MOD–004–1, and MOD–008–1 to address any lack of transparency. The Commission proposed to direct the ERO to complete this audit no later than 180 days after the effective date of the Reliability Standards.

80. The Commission emphasized that it did not intend to require the development of a single, uniform methodology for calculating available transfer capability or its components. In Order No. 890, the Commission found that the potential for discrimination does not lie primarily in the choice of an available transfer capability methodology, but rather in the consistent application of its components.[63] The Commission stated that it acknowledged in Order No. 890 that NERC was developing standards for three available transfer capability calculation methodologies. The Commission concluded that, if all of the available transfer capability components and certain data inputs and assumptions are consistent, the three available transfer capability calculation methodologies being developed by NERC would produce predictable and sufficiently accurate, consistent, equivalent and replicable results.[64]

81. The Commission clarified in the NOPR that this does not mean that the results of available transfer capability calculations on either side of an interface must be identical in every instance. The Commission stated that there are fundamental differences in the three available transfer capability methodologies set forth in the proposed Reliability Standards that may keep them from producing identical results. Even where the same methodology is used by transmission service providers on either side of an interface, the Commission stated that unique system differences or differences in risk assumptions can lead to variations in available transfer capability values.

82. The Commission also reiterated that available transfer capability reforms approved herein address interests related to the Commission's open access goals and the reliable operation of the Bulk-Power System.

1. Approval of the MOD Reliability Standards

Comments

83. Many commenters support the Commission's proposed approval of the proposed MOD Reliability Standards.[65] For example, FirstEnergy contends that the MOD Reliability Standards, as proposed, completely address the calculation of ATC and its corresponding TTC values. Others agree that the Reliability Standards represent a step forward in eliminating the broad discretion previously afforded transmission service providers in the calculation of available transfer capability.[66] In addition, several commenters state that the proposed MOD Reliability Standards will provide greater transparency and consistency in the calculation of available transfer capability, available flowgate capability, capacity benefit margins and transmission reliability margins within the transmission service industry.[67]

84. NRU, Pacific Northwest, the Public Power Council and Snohomish agree with the Commission that the use of the proposed Reliability Standards, indeed the use of any one standard, may not produce identical results when applied to a different transmission system. They also agree that, even when the same methodology is used by transmission service providers on either side of an interface, unique system differences or differences in risk assumptions can lead to variations in available transmission capability values. They state that they agree with the Commission that this will occur and is an acceptable result. They contend that each transmission provider must retain sufficient discretion to make assumptions and represent its system in the calculation such that its system reliability is assured.

85. To the extent that there are any outstanding issues not addressed in NERC's filing, APPA, the Georgia Companies and the Joint Municipals contend that the Commission should allow industry to address such issues through the NERC Reliability Standards development process. The Joint Municipals state that, imperfect though it is, the Reliability Standards development process is unequalled in its ability to secure industry input, cooperation and often consensus in the development of industry-wide protocols.

86. Midwest ISO states that it concurs that multiple available transfer capability methodologies should be permitted but disagrees that a different Reliability Standard should be developed for each methodology.

[62] Order No. 890–A, FERC Stats. & Regs. ¶ 31,261 at P 51.

[63] Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 208.

[64] *Id.* P 210.

[65] APPA, Bonneville, Duke, EEI, EPSA, Entegra, FirstEnergy, Georgia, ISO/RTO Council, SMUD and NERC.

[66] APPA, Bonneville, and ISO/RTO Council.

[67] Bonneville, ISO/RTO Council, Joint Municipals, and SMUD.

Midwest ISO contends that notwithstanding the use of an umbrella Reliability Standards, imposing a separate standard for each methodology, and corresponding risks of non-compliance therewith, could create a deterrent to using the methodology that provides the greatest benefits to reliability, where that methodology has higher compliance risks.

Commission Determination

87. The Commission adopts the NOPR proposal and approves the MOD Reliability Standards and related additions to the NERC Glossary, to be effective as proposed by NERC, as just, reasonable, not unduly discriminatory or preferential, and in the public interest. By promoting consistency, standardization and transparency, these Reliability Standards enhance the reliability of the Bulk-Power System.

88. The MOD Reliability Standards also represent a step forward in eliminating the broad discretion previously afforded transmission service providers in the calculation of available transfer capability. As the Commission explained in Order No. 890, excessive discretion in the calculation of available transfer capability gives transmission service providers the opportunity to discriminate in subtle ways in the provision of open access transmission service.[68] On systems where transmission capacity is constrained, a lack of transparency and consistency in the calculation of available transfer capability has led to recurring disputes over whether transmission service providers have performed those calculations in a way that discriminates against competitors.

89. The Commission acted in Order No. 890 to limit this remaining opportunity for discrimination by directing public utilities, working through NERC, to develop Reliability Standards to govern the consistent and transparent calculation of available transfer capability by transmission service providers. In Order No. 693, the Commission implemented that directive by requiring NERC to prospectively modify the MOD Reliability Standards it filed in April 2006 to address the requirements of Order No. 890. The proposed Reliability Standards satisfy the Commission's requirements by enhancing transparency and consistency in the calculation of available transfer capability, mandating that transmission service providers and transmission operators perform their calculations in accordance with methodologies that are both explicitly documented and available to reliability entities who request them. The proposed Reliability Standards also require documentation of the detailed representations of the various components that comprise the available transfer capability equation, and require transmission service providers and transmission operators to specify modeling and risk assumptions and disclosure of outage processing rules to other reliability entities. These actions will make the processes to calculate available transfer capability and its various components more transparent which, in turn, will allow the Commission and others to ensure that those calculations are performed consistently.

90. The Commission finds that Midwest ISO's concerns regarding the structure of the Reliability Standards to be misplaced. NERC, working through its Reliability Standards development process, developed the six Reliability Standards approved herein. The Commission believes that each Reliability Standard adequately ensures the reliable operation of the Bulk-Power System and, thus, sees no basis for limiting which methodology is chosen to calculate available transfer or flowgate capability. We believe that Midwest ISO's remaining concerns, including variation in relative compliance burdens or risks among the three methodologies, are best considered through NERC's enforcement and compliance program.

91. As discussed in greater detail later in the Final Rule, the Commission has concern regarding several of the substantive requirements of the proposed Reliability Standards. To address these concerns, pursuant to section 215(d)(5) of the FPA and section 39.5(f) of our regulations, the Commission directs the ERO to develop modifications to the Reliability Standards to address discrete issues involving: The availability of each transmission service provider's implementation documents; the consistent treatment of assumptions in the calculation of available transfer capability; the calculation, allocation, and use of capacity benefit margin; the calculation of total transfer capability under the Rated System Path Methodology; the treatment of network resource designations in the calculation of available transfer capability; and several other issues raised by commenters.

2. Implementation Timeline

Comments

92. EEI contends that the implementation date is ambiguous. EEI states that the implementation timeline could be understood to mean that the effective date of the Reliability Standards is either on the first day of the first quarter occurring 365 days after approval of these Reliability Standards or on January 1 of the year following a full calendar year after approval. Accordingly, EEI asks the Commission to clarify the intended implementation timeline.

93. Bonneville contends that a one-year implementation timeframe is unrealistic for certain portions of the proposed MOD Reliability Standards. Bonneville states that it has been preparing to comply with the flowgate methodology approach set forth in MOD–030–2. Bonneville states that, to date, it has identified twelve adjacent transmission service providers from which it will likely need to request data to determine the impacts on Bonneville's network flow based system of the existing network integration transmission service, point-to-point transmission service, and grandfathered commitments reserved on those providers' systems as required by Requirements R6 and R7 of MOD–030–2. Although Bonneville can request its adjacent transmission service providers to provide that data in aggregate form pursuant to Requirement R9 of MOD–001–1, Bonneville contends that, to obtain sufficiently detailed data, it will have to coordinate separate data exchange arrangements with each adjacent transmission service provider. Bonneville states that it is unlikely that it will be able to accomplish this, along with the necessary software changes, associated testing, and possible tariff filings that would be required to comply with the proposed Reliability Standard, within one year. Accordingly, Bonneville asks that the Commission establish a two-year implementation compliance timeframe or, in the alternative, allow entities to request extensions on a case-by-case basis.

94. In contrast, EPSA contends that the Commission should advance the implementation schedule. EPSA states that NERC provided no support for why it will take a full year from Commission approval to implement MOD–001–1. EPSA contends that transmission service providers have long known that Order No. 890's available transfer capability reform was coming. EPSA further contends that much of what is proposed in the MOD NOPR could be accomplished during the MOD NOPR's

[68] Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 68.

development, if not before. EPSA questions whether the documentation process and accompanying software changes will require a full year. Absent compelling reasons, EPSA argues that the Commission should reject the proposed implementation timeline and set a new timeline that accommodates actual implementation issues so as not to defer any longer the benefits of Order No. 890.

Commission Determination

95. As approved, the Reliability Standards shall become effective on the first day of the first calendar quarter that is twelve months beyond the date that the Reliability Standards are approved by all applicable regulatory authorities. The Commission finds that the approved implementation schedule strikes a reasonable balance between the need for timely reform and the needs of transmission service providers and transmission operators to make adjustments to their calculations of available transfer capability, capacity benefit margin and transfer reliability margin. To the extent necessary, we clarify that, under this plan, the Reliability Standards shall become effective on the first day of the first quarter occurring 365 days after approval by all applicable regulatory authorities. Approval by the Commission will be effective 60 days after the date of publication of this Final Rule in the **Federal Register.** If a transmission service provider or transmission operator is unable to implement these Reliability Standards within the time allowed, requests for extension should be considered through NERC's enforcement and compliance program.

3. Implementation Document Audits

a. Authority To Direct Audits

Comments

96. Many commenters expressed concern that the Commission's proposal to direct NERC to conduct audits of the available transfer capability, capacity benefit margin and transfer reliability margin implementation documents would be an inappropriate use of the Commission's authority under section 215 of the FPA.[69] They contend that the proposed audits would engage NERC in the Commission's market oversight functions, and expand the scope of the ERO's delegated responsibilities beyond its statutory duty to develop and enforce Reliability Standards to ensure the reliability of the Bulk-Power System.

97. NERC states that section 215 recognizes the distinction between reliability matters (where the Commission is to give ''due weight to the technical expertise of the ERO''), and matters affecting competition (where the Commission is to give no such deference). NERC states that, while it understands that consistent treatment of transmission customers in functions related to competitions and markets is an important part of the Commission's open access policies, this is not within NERC's mandate to address as the ERO. NERC contends that the Commission's proposed directive blurs the line between commercial interests and reliability interests and is not based on an objective evaluation of the impact to the reliability of the Bulk-Power System.

98. NERC contends, and others agree, that the Commission should address its goals through business practice standards developed by NAESB and through specific Commission rulemakings that direct entities to which the Commission's market-based jurisdiction applies to take action consistent with the Commission's open access goals. TANC states that NERC's filing letter was clear that NERC and NAESB have agreed that any item that is directly related to the Open Access Same Time Information System or other commercial interactions between customers and transmission providers are within the scope of NAESB activities. TANC points out that NERC's filing letter states repeatedly that the focus of the proposed Reliability Standards is to address only the reliability, not commercial, aspects of available transmission.

99. Similarly, ISO/RTO Council agrees that the Commission should pursue such commercial concerns through another forum such as the NAESB standards. ISO/RTO Council expresses concern that the Commission's proposed directive could undermine the coordination efforts between NERC and NAESB on these issues. In addition, ISO/RTO Council contends that the NOPR overstates reliability concerns associated with the standards and that the Commission lacks justification for additional directives. ISO/RTO Council states that overestimation and hence overselling of ATC can result in potential or actual violations of system operating limits and interconnection reliability operating limits but claims there has not been a single incident in which a system operating limit and interconnection reliability operating limit has been violated due to the overselling of available transfer capability.

100. ISO/RTO Council states that the subject of the proposed audits is not related to compliance with NERC Reliability Standards or reliability in any way. ISO/RTO Council argues that such audits are not in themselves Reliability Standards compliance audits which are appropriately conducted by the ERO and its Reliability Entities through a set schedule. Rather, ISO/RTO Council argues, the proposed audits are designed to allow the Commission and others to replicate and verify calculations to satisfy a competition-related concern.

101. EEI contends that a Reliability Standard must address a reliability concern that falls within the statutory framework of section 215. EEI further contends that the purpose of a Reliability Standard may not extend beyond the reliable operation of the Bulk-Power System. EEI states that it is appropriate for the Commission to determine if a Reliability Standard is unduly discriminatory.[70] But, EEI contends, there is a difference between a Reliability Standard that is not unduly discriminatory and a standard that furthers open access goals that are not a part of the reliable operation of the Bulk-Power System. EEI states that the potential discrimination described in the NOPR is related to the provision of transmission service under an OATT and, to the extent the Commission or others believe such discrimination exists, the Commission has the authority and jurisdiction to address such discrimination under sections 205 and 206 of the FPA. According to EEI, it is imperative that the ERO maintain focus on its reliability duties rather than taking on additional duties to police implementation of tariffs and comparability issues.[71]

102. EEI and Entegra separately ask the Commission to clarify that, under Order No. 890, transmission service providers are required to adhere to the Commission's policies regarding non-discriminatory open access transmission service in their exercise of discretion under the standards. They also ask the Commission to clarify that it will retain jurisdiction under Order No. 890 after approval of the MOD Reliability Standards to remedy any undue

[69] *E.g.,* NERC, Duke, EEI, EPSA, EEI, Entegra, the Georgia Companies, ISO/RTO Council, NRU, NYISO, Pacific Northwest, Public Power Council, Snohomish, Puget Sound, SMUD, Joint Municipals, and TANC.

[70] *Citing Rules Concerning Certification of the Electric Reliability Organization; Procedures for the Establishment, Approval, and Enforcement of Electric Reliability Standards,* Order No. 672, 71 FR 8662 (Feb. 17, 2006), FERC Stats. & Regs. ¶ 31,204, at P 332 (2006); *order on reh'g,* Order No. 672–A, 71 FR 19814 (Apr. 18, 2006), FERC Stats. & Regs. ¶ 31,212 (2006).

[71] *See also* Duke, NYISO and TANC comments.

discrimination that may result from the implementation of these standards by individual transmission operators or transmission service providers. Entegra separately argues that while it may be necessary and appropriate for the Commission to rely on the NERC process to develop requirements that are solely related to reliability, the Commission cannot and should not abdicate its statutory authority to prevent undue discrimination by delegating to NERC its responsibility to enforce its open access requirements.

103. Although commenters such as NRU, Pacific Northwest, Public Power Council, Snohomish and SMUD agree that undue discrimination in transmission service must be addressed, they also contend that such a goal is not a statutory purpose that Reliability Standards are intended to address. Puget Sound agrees, stating that available transfer capability calculations have little impact on reliability. SMUD states that it is troubled by language in the NOPR that suggests that commercial concepts be addressed by the Reliability Standards, even where no clear nexus to reliability exists. NRU, Pacific Northwest, Public Power Council, and Snohomish state that the Commission has provided no reliability-based justification for the proposed audit directive and that the proposal cannot be supported on the basis of reliability.

104. The Joint Municipals agree that the Commission has not articulated a sufficient statutory basis for the proposed audits. The Joint Municipals state that the courts have been clear that the Commission must be rigorous in identifying the statutory authority under which it proceeds. The Joint Municipals comment that the Commission is charged with the responsibility to ensure non-discrimination in the provision of transmission service under sections 205, 206 and 211A of the FPA; whereas section 215 clearly identifies reliability as the only purpose of the ERO regime. Accordingly, the Joint Municipals ask the Commission to make clear that in the exercise of its prosecutorial discretion, it will ensure that the Commission and NERC enforcement processes will be focused on violations of the proposed Reliability Standards that threaten system reliability. The Joint Municipals argue, however, that a review of Order Nos. 890, 693 and the NOPR make clear that the impetus for developing a consistent, transparent approach to available transfer capability lies in the Commission's concern over discrimination in the provision of transmission service, rather than system reliability.[72]

105. By contrast, EPSA states that it supports and applauds the Commission's efforts to meld the reliability goals of Order No. 693 and the non-discriminatory goals of Order No. 890. EPSA contends that the contributions that market mechanisms make to system reliability, and the need to preserve the positive link between reliability and markets, is a significant dimension of the new Reliability Standards development process. EPSA commends the Commission for recognizing the connection between the MOD Reliability Standards and the initiative to reform Order No. 890 to address existing opportunities for to discriminate against competitive power suppliers. EPSA states that Order Nos. 890 and 693 articulated serious concerns regarding the lack of clarity, transparency and uniformity in the critical calculations pertaining to one of the most fundamental aspects of the wholesale Bulk-Power System from both a reliability and commercial perspective.

Commission Determination

106. The Commission hereby adopts the NOPR proposal to direct the ERO to conduct an audit of the various implementation documents developed by transmission service providers to confirm that the complete available transfer capability methodologies reflected therein are sufficiently transparent to allow the Commission and others to replicate and verify those calculations. The Commission clarifies that these audits are not intended to address the competitive effects of these MOD Reliability Standards.[73] Instead, the audit should review each component of available transfer or flowgate capability, including the transmission service provider's calculation of capacity benefit margin and transmission reliability margin, for transparency and verifiability to ensure compliance with the MOD Reliability Standards. In the course of its audit, NERC is directed to identify any parameters and assumptions that are not sufficiently specific or transparent to allow the Commission and others to replicate and verify the results.

107. The Commission disagrees with commenters asserting that the scope of this audit is irrelevant to the Reliability Standards or the reliability of the Bulk-Power System. Requirement R3.1 of MOD–001–1 requires transmission service providers to include in their available transfer capability implementation documents information describing how the selected methodology (or methodologies) has been implemented. Transmission service providers are to provide enough detail for the Commission and others to validate the results of the calculation given the same information used by the transmission service provider. Thus, Requirement R3.1 of MOD–001–1 requires transmission service providers to include enough information in their available transfer capability or available flowage capability implementation documents to confirm that the respective methodologies reflected therein are sufficiently transparent to allow the Commission and others to replicate and verify those calculations. Consequently, the audit is directly relevant to compliance with the Reliability Standards as proposed by the ERO and approved by the Commission in this Final Rule.

108. As described above, the Reliability Standards approved herein are the result of a long process before the Commission. In Order No. 890, the Commission, among other things, expressed concern that a lack of consistent, industry-wide available transfer capability calculation standards poses a threat to the reliable operation of the Bulk-Power System.[74] In light of these concerns, the Commission directed public utilities, working through the NERC Reliability Standards development process, to develop Reliability Standards for the consistent and transparent calculation of available transfer capability.[75] One month later, the Commission issued Order No. 693, which directed the ERO to modify nine out of ten approved MOD Reliability Standards to be consistent with the requirements in Order No. 890. Thus, the MOD Reliability Standards approved here today are the result of efforts by the Commission, the ERO and industry to address concerns related to the reliable operation of the Bulk-Power System.

109. The Commission clarifies that it is not directing the ERO to perform a

[72] *Citing* Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 83 (stating that the ''purpose of increasing consistency and transparency of [available transfer capability] calculations is to reduce the potential for undue discrimination in the provision of transmission service.'') *See also* NOPR, FERC Stats. & Regs. ¶ 32,641 at P 2 (stating that the proposed Reliability Standards ''address the potential for undue discrimination by requiring industry-wide transparency and increased consistency regarding all components of the [available transfer capability] methodology and certain definitions, data, and modeling.''

[73] *See infra* section III.3.b.ii.

[74] Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 195.

[75] *Id.* P 196.

market-based analysis of the competitive effects of the Reliability Standards approved herein. Although the ERO should attempt to develop Reliability Standards that have no undue negative effects on competition,[76] the ERO's statutory functions are properly focused on the reliability of the Bulk-Power System and the Commission does not intend to broaden that focus here. The Commission reiterates that a proposed Reliability Standard should not unreasonably restrict available transmission capability on the Bulk-Power System beyond any restriction necessary for reliability and should not limit use of the Bulk-Power System in an unduly preferential manner. The Reliability Standard should not create an undue advantage for one competitor over another.[77] Nonetheless, pursuant to sections 205 and 206 of the FPA, the Commission shall remain the final arbiter of undue discrimination. The MOD Reliability Standards approved in this Final Rule require transmission service providers to document their methodologies for calculating available transfer capability or available flowgate capability in a transparent and consistent manner. Compliance with these requirements is essential to reducing the threat posed to the reliable operation of the Bulk-Power System, particularly with respect to the inability of one transmission provider to know with certainty its neighbors' system conditions affecting its own available transfer capability values.[78]

110. Specifically, each of the methodologies for calculating available transfer capability or available flowgate capability provides an algorithm for calculating the respective values. Each of these algorithms requires values for capacity benefit margin and transfer reliability margin. For example, Requirement R10 of MOD–028–1 states:

> [available transfer capability] = [total transfer capability] – [existing transmission commitments] – [capacity benefit margin] – [transfer reliability margins] + postbacks + counterflows.

Thus, in order to validate the results of the available transfer capability or available flowgate capability calculations, the Commission and others must be able to validate the calculations for capacity benefit margin and transfer reliability margin. Accordingly, the Commission directs the ERO to audit the capacity benefit margin and transfer reliability margin implementation documents, created pursuant to MOD–004–1 and MOD–008–1 respectively, to ensure that these documents include information, in such detail that, given the same information, the results of the capacity benefit margin or transfer reliability margin calculation can be validated.

111. Although the Commission directs the ERO to conduct audits to ensure compliance with the requirements of the MOD Reliability Standards, the Commission will remain vigilant in its efforts to reduce the potential for undue discrimination in the provision of transmission service pursuant to its authority under sections 205 and 206 of the FPA. Accordingly, transmission customers and neighboring transmission providers will have the opportunity to submit complaints pursuant to section 206 of the FPA, if they believe that a transmission provider is using assumptions or parameters in available transfer capability calculations in an unduly discriminatory or preferential manner.[79]

b. Performance of Audits

Comments

112. Many commenters, including NERC, indicate that NERC lacks the expertise to conduct the proposed audits. These commenters suggest that Commission staff is more suited to perform the audits that pertain to market issues. Others, such as EPSA, support the proposed audits but recognize that NERC staff may not have sufficient knowledge and skill for the task. Other commenters ask for clarification regarding the scope and details of such audits. NERC and others contend that the proposed 180-day deadline for NERC to complete the audits is overly-burdensome and unrealistic, while Entegra supports the NOPR proposal to complete the audits within 180-days of the effective date of the Reliability Standards.

i. NERC Expertise

113. NERC indicates that obtaining personnel with the technical expertise needed to evaluate the implementation of these audits will result in staffing challenges that could be more complex than the Commission foresees. NERC expresses concern that, if the Commission expands the role of the ERO to begin enforcement of open access service, it would not be able to perform the audits with its current staff and would therefore need to hire new employees or consultants. Moreover, NERC contends that it may prove extremely difficult to locate and acquire new employees or consultants with the appropriate qualifications to not only review an implementation document for its engineering merits but also for its commercial implications.

114. Several commenters agree that NERC and the Regional Entities lack the ability, experience, authority or staff determine whether the Commission or transmission customers have sufficient and accurate information for commercial and economic purposes or to ensure compliance with the competition goals of Order No. 890.[80] The Georgia Companies point out that the Reliability Standards were developed by NERC using industry experts on reliability, not necessarily experts on the commercial or regulatory implications of undue discrimination in the provision of transmission service. Similarly, TAPS and TANC contend that the Commission should not require NERC to divert its limited resources to cover market oversight and competition issues. EPSA argues that if both the reliability goals of Order No. 693 and the non-discriminatory access goals of Order No. 890 become the responsibility of NERC and the regional reliability entities, the achievement of each will be diffused. EPSA further contends that a reliability audit cannot be a substitute for an audit of transmission access practices and measures.

115. Some commenters recommend that, if the Commission is interested in auditing the implementation documents to address commercial concerns, the Commission itself should perform the audits.[81] For example, APPA states that the role of detecting and remedying undue discrimination properly falls upon the Commission, acting in an audit and compliance role or acting upon customer complaints that transmission service providers or

[76] Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 332.

[77] *Id.*

[78] Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 195.

[79] The ERO is to conduct audits to ensure compliance with the MOD standards to assure the reliable operation of the grid. Further, the Commission is not directing that the scope of the audit include an active search or review of anomalous events or unduly discriminatory behavior. If, however, in the course of an audit the ERO happens to identify any assumptions or parameters that appear anomalous, that may appear to cause available transfer capability calculation results to be skewed toward a particular result even if the implementation documents can be validated according to Requirement R3 of MOD–001–1, or that appear to violate NERC's market-reliability interface principles that the Commission acknowledged in Order No. 672, the ERO is free to notify the Commission's Office of Enforcement of such anomalies.

[80] *E.g.,* APPA, Cottonwood, EEI, EPSA, NRU, Pacific Northwest, Public Power Council, Puget Sound, Joint Municipals and Snohomish.

[81] *E.g.,* Cottonwood, EEI, EPSA, Puget Sound, TAPS and TANC.

transmission operators have failed to fully comply with transparency obligations. Puget Sound states that the Commission has an established method to conduct such audits—the OATT process. If the Commission chooses to direct NERC to conduct these audits, Entegra argues that NERC staff should be required to conduct the audit under the guidance of Commission staff.

ii. Audit Scope

116. Several parties also question the intended scope of the proposed audits.[82] For example, Entegra contends that the Commission should specify in greater detail the contents of the audit with Commission staff acting as subject matter experts with respect to the Commission's policies for non-discriminatory open access transmission service. To the extent an audit team identifies an item in an implementation document as unduly discriminatory or preferential, or otherwise does not comply with the requirements of Order Nos. 890 and 693, Entegra recommends that the Commission should require the transmission service provider to modify the item during the audit process as appropriate. Entegra states that the audit report should identify and document all areas where the implementation document did not comply with Order Nos. 890 and 693 and explain how the non-compliance was corrected. Further, Entegra suggests that the Commission should specify that the audit findings are preliminary and that it will establish notice and comment procedures for the initial audit report. Finally, Entegra recommends that the Commission should commit to reopen the audit and/or direct any necessary modifications to the implementation documents if the comments of interested parties indicate that any items in the implementation documents are unduly discriminatory or preferential or otherwise do not comply with the Commission's open access requirements in Order Nos. 890 and 693.

117. The Georgia Companies recommend that the Commission describe how it proposes the Commission and others should be able to replicate and verify results and allow proper time for NERC and the industry to determine a plan that meets the Commission's proposals as well as state and regional requirements. The Georgia Companies also ask that the Commission limit its review of capacity benefit margin and transmission reserve margin implementation documents to their effect on reliability, not undue discrimination.

118. EPSA recommends the Commission convene a technical conference to clarify the audit scope, responsibilities and jurisdictional questions. In addition, EPSA contends that the Commission needs to have a process to handle complaints as they arise.

119. Puget Sound states that the Commission needs to rationalize the OATT enforcement regime, which its staff oversees, and the NERC reliability rule enforcement regime, as they will both apply to the same total transfer capability/available transfer capability concepts. Puget Sound states that the Commission must be absolutely clear that the regimes, as they both address available transfer capability calculations, are completely consistent and that there is no interpretation gap between enforcement personnel and auditors from the two separate entities. Puget Sound contends that this is necessary because there is a significant risk of conflicting or at least inconsistent interpretations and questions the appropriateness of having two enforcement regimes cover the same issue.

120. NYISO expresses concern that the proposed audits might be interpreted to require NYISO to publicly disclose confidential market and transmission information in its implementation document. NYISO argues that requiring independent system operators (ISOs) and regional transmission organizations (RTOs) to reveal information, such as transmission flow utilization variables, would place them in a position of choosing to comply with the NERC available transfer capability replication requirement or internal codes of conduct that forbid ISOs and RTOs from revealing such information. NYISO contends that it is not necessary for confidential information to be revealed in order to allow market participants to replicate available transfer capability calculations. Accordingly, NYISO asks the Commission to clarify that its audit requirement is not meant to require ISOs and RTOs to make confidential information publicly available, and that other methods can be used to allow market participants to replicate available transfer capability calculations without such disclosure.

121. The ITC Companies contend that the audit process should be strengthened to effectively detect evidence of oversubscription or underutilization of the transmission system and ensure that the commercial aspect of the available transfer capability closely matches the system available transfer capability calculations. The ITC Companies suggest, as an example, an audit of adjacent transmission service providers where they both calculate the available transfer capability or available flowgate capability for the same flowgates or paths. The ITC Companies state that, usually, the two calculations should have similar results and that any major difference would be the result of differences in assumptions or study parameters. In addition, the ITC Companies comment that the Commission should open up the results of the NERC audit for further comments prior to directing NERC to modify the Reliability Standards to address any lack of transparency in the calculation of ATC and each of its components.

iii. Audit Timeline

122. NERC, and other commenters, oppose the 180-day deadline for NERC to complete the audits.[83] NERC contends that the imposition of a 180-day deadline to complete these audits places a higher priority on these issues than is warranted. NERC states that consistency in available transfer capability practices (or the lack thereof) in the treatment of transmission has a relatively low reliability impact on the Bulk-Power System compared to numerous other core areas under which NERC has responsibilities. NERC states that under its Commission-approved rules, NERC must conduct an audit of users, owners and operators of the Bulk-Power System every three years. NERC contends that the NOPR provides no explanation of the reliability benefits that would necessitate an audit cycle accelerated beyond this three year schedule. In addition, NERC contends that if the Commission insists on broadening NERC's responsibilities, NERC will need more than 30 days to develop and submit a timeline for the completion of these audits. NERC asks that the Commission allow the ERO sufficient time to appropriate consider the best ways to restructure its resources in light of its new responsibilities.

123. APPA agrees with NERC stating that the Commission's proposed timeline is potentially very burdensome. APPA, TANC and TAPS state that the proposed timeline will likely divert scarce NERC and registered entity staff resources from other tasks that are more central to NERC's responsibilities as the ERO. They recommend that such audits take place on the normal three-year or five-year audit cycles applicable to these

[82] *E.g.,* Entegra, EPSA, the Georgia Companies, ITC Companies, NYISO, and Puget Sound.

[83] *E.g.,* APPA, Bonneville, ColumbiaGrid, Georgia Companies, TANC and TAPS.

reliability functions. The Georgia Companies state that full audits with on-site visits of each transmission owner and transmission service provider likely cannot be completed within 180 days. ColumbiaGrid suggests that NERC should be permitted to audit a representative sample of entities rather than every single one and then assess whether a broader audit is necessary.

124. By contrast, Entegra suggests that the Commission should require NERC to complete the proposed audit within 180 days of the publication of this Final Rule. Entegra points out that, as proposed, the proposed audit will not be due until 18 to 21 months from the approval date. Entegra contends that NERC has not explained why drafting the implementation documents and making the corresponding changes to software and operating procedures will require 12 to 15 months after approval. Accordingly, Entegra suggests that the Commission should require all transmission service providers to finalize their implementation documents and submit to NERC within 90 days of the approval date and require NERC to complete the audit within 90 days after receipt of these implementation documents. Entegra states that transmission providers will have to complete their implementation documents well in advance of the actual implementation. Entegra argues that requiring the audit before the effective date would allow NERC and the Commission opportunity to identify and remedy—at the front end—any individual or systematic problems that NERC of the Commission find in the transmission service provider implementation documents.

Commission Determination

125. While we adopt the NOPR proposal to direct NERC to conduct an audit, we are persuaded by the comments of the ERO and others to modify the NOPR proposal regarding certain details on implementation of the required audits. First, as already discussed above, the Commission will not require the ERO to perform an audit that requires the ERO to assess whether a transmission operators' or transmission service providers' available transfer capability methodology provides opportunities for undue discrimination or preference. Rather, the ERO audits must focus on compliance with the provisions of the MOD Reliability Standards. In accord with the position of numerous commenters, Commission staff is in a more appropriate position to analyze market-related issues. Thus, the ERO must retain information and material gathered during the course of its audit and make it available to Commission staff upon request, so as to allow Commission staff to inquire into possible anti-competition concerns.

126. Moreover, the Commission is persuaded that the ERO should conduct the audits in the due course of its periodic, three-year audit cycle, *i.e.,* these Reliability Standards should be added to the ERO's list of actively monitored Reliability Standards. The Commission believes that these modifications to the NOPR proposal address the concerns of the ERO and others regarding the expertise of the ERO to conduct the audits and the availability of ERO resources to conduct the audits in a more limited period of time.

127. The audits directed herein should not displace any of NERC's existing scheduled audits or priorities. If NERC is unable to perform the audits with current staff without sacrificing other audit priorities, it can seek additional resources to perform the audits. Since the MOD Reliability Standards will not become effective until more than one year from Commission approval, NERC can request any additional funding necessary to undertake the audits in its 2011 business plan and budget proposal. Thus, NERC will have sufficient opportunity to perform the audits without any undue burden.

128. We decline to direct how the ERO should conduct the MOD Reliability Standards audit, as requested by some commenters. We believe that our action to focus the ERO audit on compliance with the requirements of the Reliability Standards, matches the scope of the audits to the ERO's expertise. The ERO should be fully capable of developing an audit to measure compliance with the requirements of its Reliability Standards. In directing this audit, the Commission does not expect NERC's staff to have expert knowledge of the competition requirements of Order No. 890.

129. If the Commission determines upon its own review of the data, or upon review of a complaint, that it should investigate the implementation of the available transfer capability methodologies, the Commission will need access to historical data. Accordingly, pursuant to section 215(d)(5) of the FPA and section 39.5(f) of our regulations, the Commission directs the ERO to modify the Reliability Standards so as to increase the document retention requirements to a term of five years, in order to be consistent with the enforcement provisions established in Order No. 670.[84]

130. With regard to concerns raised by commenters regarding the non-disclosure of confidential information, we expect the ERO to conduct the MOD Reliability Standards audits consistent with section 1500 of NERC's Rules of Procedure, which provides detailed rules for the protection of confidential information. Section 1505 of NERC's Rules specifically addresses the ERO's provision of confidential information to the Commission or another governmental agency in response to a request for information by that agency. Likewise, the implementation documents will be made publicly available through the corresponding NAESB business standards, approved concurrently with this Final Rule, which incorporate appropriate confidentiality protections.[85]

131. As indicated above, we are persuaded by the commenters that the proposed 180-day time frame for conducting the MOD Reliability Standards audits is not practical, and likely not feasible. Upon further consideration, the Commission hereby directs the ERO to conduct these audits in the course of its periodic, three-year audits of users, owners and operators of the Bulk-Power System. The ERO shall begin this audit process 60 days after the implementation of these Reliability Standards. On an annual basis, to commence on 180 days after the implementation of the Reliability Standards approved herein, the ERO shall file the audit reports (or the results of its audit in any other format) with the Commission.[86]

c. Additional Requirements To Prevent Undue Discrimination

NOPR Proposal

132. In the NOPR, the Commission sought comment whether additional requirements should be directed in this proceeding to ensure that the discretion provided under the available transfer capability implementation documents cannot be used to unduly discriminate in the provision of transmission service.

Comments

133. ISO/RTO Council contends that the proposed MOD Reliability Standards

[84] *Prohibition of Energy Market Manipulation,* Order No. 670, 71 FR 4244 (Jan. 26, 2006), FERC Stats. & Regs. ¶ 31,202, at P 63 (2006) (*citing* 28 U.S.C. § 2462 (2000)).

[85] *See Standards for Business Practices and Communication Protocols for Public Utilities,* Order No. 676–E, 129 FERC ¶ 61,162 (2009).

[86] The Commission does not anticipate allowing an opportunity for public comment on the filed audit reports.

offer the appropriate level of discretion in the calculation of the various parameters including the ATC, and that the discretion afforded cannot be used to unduly discriminate the provisions of the transmission service. Accordingly, ISO/RTO Council believes that no additional requirements should be directed in this proceeding. It is not possible to identify and state all assumptions in the requirements for the given set of Reliability Standards.

134. SMUD and Salt River contend that the Reliability Standards may not lawfully be expanded to include matters that do not impact the reliability of the Bulk-Power System, such as the NAESB business practices. They contend that incorporating NAESB business practices and open access concepts in the Reliability Standards creates confusion about how the Reliability Standards will be applied. SMUD states, as an example, that it is not subject to the NAESB business practices and has not been involved in their development. SMUD also points out that the NAESB standards are subject to change by Commission order. Similarly, SMUD contends that the Reliability Standards should not be melded with the Commission's open access policies because such policies do not apply to SMUD. Salt River also argues that allowing the Reliability Standards to be subject to change by the Commission, NAESB or any other third party could create situations where third-party revisions of such regulations or business practices could be construed as effectively modifying the Commission-approved Reliability Standards. Accordingly, SMUD and Salt River argue that compliance with these Reliability Standards must be governed by the four corners of the standard and not incorporate by reference or otherwise NAESB business practices or the Commission's open access policies.

Commission Determination

135. As the Commission stated in the NOPR, it is appropriate for transmission service providers to retain some level of discretion in the calculation of available transfer capability. Requiring absolute uniformity in criteria and assumptions across all transmission service providers would preclude transmission service providers from calculating available transfer capability in a way that accommodates the operation of their particular systems. The Commission disagrees with ISO/RTO Council's argument that the discretion afforded in these Reliability Standards cannot be used to unduly discriminate the provisions of the transmission service. It is possible, for example, for a transmission service provider to use parameters and assumptions that skew its available transfer capability values toward a particular result in a way that discriminates against certain types of customers. As discussed above, the Commission accepts these risks and expects that they will be mitigated through complaints as well as the Commission's own market oversight authority.

136. In response to SMUD and Salt River, the Commission notes that the MOD Reliability Standards do not incorporate the NAESB standards. NERC and NAESB worked together to create two, distinct sets of standards with overlapping interests. The NAESB standards impose certain posting requirements of the available transfer capability information generated by these MOD Reliability Standards but compliance with the MOD Reliability Standards does not depend upon compliance with the NAESB standards.

B. Modification of the Reliability Standards

1. MOD–001–1

a. Availability of the Implementation Documents

NOPR Proposal

137. In the NOPR, the Commission expressed concern that the Reliability Standards potentially restrict the disclosure of the available transfer capability, capacity benefit margin, and transmission reliability margin implementation documents. Requirements R4 and R5 of MOD–001–1 requires transmission service providers to provide a current available transfer or flowgate capability implementation document to the following entities and to notify the same entities before implementing a new or revised implementation document: Each planning coordinator, reliability coordinator, and transmission operator associated with the transmission service provider's area; each planning coordinator and reliability coordinator adjacent to the transmission service provider's area; and, each transmission service provider whose area is adjacent to the transmission service provider's area. Similarly, Requirement R2 of MOD–004–1, requires transmission service providers maintaining to capacity benefit margin to make available its current capacity benefit margin implementation document to the following entities: Transmission operators, transmission service providers, reliability coordinators, transmission planners, resource planners, and planning coordinators that are within or adjacent to the transmission service provider's area, and to the load serving entities and balancing authorities within the transmission service provider's area, and notify those entities of any changes to the implementation document prior to the effective date of the change. Finally, Requirement R3 of MOD–008–1, requires transmission operators using transfer reliability margin to make available its transfer reliability margin implementation document, and if requested, underlying documentation, to any of the following who make a written request no more than 30 calendar days after receiving the request: Transmission service providers, reliability coordinators, planning coordinators, transmission planners, and transmission operators.

138. The Commission pointed out that NERC did not explain in its filings why only certain entities would have access to these materials nor why the specified list of recipients varies for each documents. Although the proposed NAESB standards accompanying the Reliability Standards would require transmission service providers to post a link to the implementation documents on their OASIS, which would result in disclosure beyond the specified entities listed in the Reliability Standards, the Commission stated that it is important for reliability purposes to require disclosure of the implementation documents to a broader audience than provided in the Reliability Standards.[87] The Commission explained that its jurisdiction under section 215 of the FPA is broader than its jurisdiction to require compliance with the NAESB standards under sections 205 and 206 of the FPA. The Commission stated that these documents will describe how the transmission provider implements the Reliability Standards and, therefore, should be disclosed by all transmission service providers, not only those who are also public utilities.

139. Therefore, to ensure sufficient transparency, the Commission proposed to direct the ERO, pursuant to section 215(d)(5) of the FPA and section 35.19(f) of our regulations to modify the proposed Reliability Standards to make the available transfer capability, capacity benefit margin, and transmission reliability margin implementation documents available to all customers eligible for transmission service in a manner that is consistent with relevant NAESB standards.[88] The Commission also sought comment on any improvements that may be

[87] NOPR, FERC Stats. & Regs. ¶ 32,641 at P 104.

[88] *Id.* P 105.

necessary to improve access by transmission customers to the implementation documents.

Comments

140. NERC objects to the Commission's proposal to expand the availability of the implementation documents. NERC states that the Commission's proposal crosses the line between reliability matters and commercial and open access matters. NERC contends that the Commission provides no explanation of how reliability could be compromised by not making these implementation documents available to all eligible transmission customers. Although NERC agrees that it is critical that reliability entities have access to the necessary information regarding Bulk-Power System reliability, NERC contends that transparency related to ensuring open access and consistent treatment for all transmission customers is not critical to reliability or within NERC's area of responsibility.

141. NERC states that the Commission has other tools and authorities to police its open access policies. NERC states that its mandate is to ensure the reliability of the Bulk-Power System. It also states that it has coordinated procedures with NAESB to address the appropriate assignment of tasks that could have a reliability or a commercial impact, and the actions proposed by the Commission could undermine that coordination. Accordingly, NERC asks the Commission to address its desired goals through the business practice standards developed by NAESB and through specific Commission rulemakings that direct entities to which the Commission's market-based jurisdiction applies to take action consistent with the Commission's open access goals.

142. Many commenters agree that the availability of the implementation documents should be limited to those entities with a reliability need for such information.[89] These parties argue that expanding the availability of the implementation documents to entities without a reliability need for such information is beyond the ERO's statutory authority, which is limited to ensuring the reliable operation of the Bulk-Power System. Several entities agree that any information provided as part of any Reliability Standard should be restricted to that which is needed to ensure reliability.[90] ISO/RTO Council further argues that achieving transparency by making these documents available to the public is not related to reliability. Similarly, the Georgia Companies contend that it is beyond the scope of NERC's authority to make these documents available to unregistered entities that do not have to comply with the Reliability Standards.

143. Many commenters also argue that the availability of the implementation documents is a business practice issue that should be dealt with in NAESB standards.[91] Although parties such as EEI contend that the NAESB standards do not provide sufficient confidentiality protections for competitively sensitive information, others, such as APPA contend that NAESB is a more appropriate standards development forum with which to craft and maintain these business practices and associated confidentiality agreements. APPA also suggests that disputes concerning access to such information fall squarely within the Commission's jurisdiction and expertise under sections 205 and 206 of the FPA and not within NERC's responsibilities under section 215 of the FPA.

144. By contrast, Entegra argues that the Commission should direct the ERO to modify MOD–001–1 to require each transmission service provider to make available, upon request, all relevant documentation, input data, models, assumptions and other materials necessary to replicate the transmission service provider's available transfer capability calculations and results and to verify that the transmission service provider has applied its methodology and models in a consistent, non-discriminatory manner. If a data item used in a calculation is confidential, Entegra suggests it should be so identified in the implementation document, and made available subject to a confidentiality or non-disclosure agreement. Entegra also suggests that, because NERC proposes to leave to the NAESB process any posting requirements, the NERC Reliability Standard should require transmission service providers to provide a complete, regularly updated (i.e., at least once per day) list of all of the above materials that are not posted, but are to be made available upon request.

145. Puget Sound also supports the Commission proposal to make the implementation documents more broadly available and to impose comparable disclosure requirements on non-jurisdictional entities. However, to the extent that the proposed MOD Reliability Standards continue to require available transfer capability algorithm documentation, in addition to Appendix C to the OATT, the available transfer capability implementation document, the capacity benefit margin implementation document, and the transfer reliability margin implementation document, Puget Sound contends that such documentation obligations are duplicative and overly burdensome. Accordingly, Puget Sound recommends the development of a single documentation process for these related obligations. Puget Sound contends that it would be confusing to customers and counterproductive if the OATT Attachment C documentation is not consistent with the NERC required documentation.

146. TAPS supports the Commission's proposal to make the implementation documents available to all customers eligible for transmission service in a manner that is consistent with relevant NAESB standards. TAPS contends that it is essential from a competitive perspective for customers to have timely access to this data. TAPS also contends that the proposed expanded disclosure requirements are consistent with the Commission's obligation to review *de novo* the competitive impact of the proposed standards under section 215(d)(2) of the FPA. TAPS contends that, unless entities who purchase transmission service have timely access to the transmission available implementation documents, they will not be able to verify the amount of transmission that appears to be available, undermining the Commission's effort to enhance reliability and competition through more accurate and transparent calculation of available transfer capability.

Commission Determination

147. As noted in several comments, expanding the availability of the implementation documents to entities beyond the registered entities listed in the Reliability Standards may stretch the role of the ERO beyond ensuring reliability of the Bulk-Power System and could be duplicative of the associated NAESB standard requirements. Therefore, upon further consideration, the Commission declines to adopt the NOPR proposal to direct the ERO to modify MOD–001–1 to expand the availability of the implementation documents beyond those entities with a demonstrated reliability need to access such information. Instead, the Commission approves the availability provisions of the Reliability Standards

[89] *E.g.*, APPA, Bonneville, Duke, EEI, the Georgia Companies, ISO/RTO Council, Pacific Northwest, SMUD, Snohomish, TANC.

[90] *E.g.*, Bonneville, EEI, SMUD, Snohomish, Salt River.

[91] *E.g.*, APPA, Bonneville, ColumbiaGrid, ISO/RTO Council, Pacific Northwest, SMUD, Snohomish, Salt River.

as written. NERC has provided sufficient justification for limiting disclosure of the implementation documents to a discrete set of registered entities that have been identified as having a reliability need for such information.

148. In response to Puget Sound, the Commission finds that the disclosure requirements imposed here are not overly burdensome or duplicative of a transmission service provider's obligation to include these available transfer capability algorithms in Appendix C to the OATT. The implementation documents developed under the MOD Reliability Standards ensure transparency for the sake of the reliable operation of the Bulk-Power System whereas the reporting requirements in Attachment C of the OATT are designed to reduce opportunities for undue discrimination. Although the algorithms may be repeated in both documents, the supporting information and the purpose for providing that information differ greatly. Moreover, the disclosure requirements of these MOD Reliability Standards are binding on all transmission providers, not just those within the Commission's jurisdiction under sections 205 and 206 of the FPA.

149. As written, the Reliability Standard requires all transmission service providers to make the implementation documents available to designated reliability entities. With the modification directed above, the Commission is confident that disclosure will be broad enough to ensure the reliable operation of the Bulk-Power System. The Commission's concerns for broad availability of the implementation documents are sufficiently mitigated by the disclosure requirements of the related NAESB standards.[92] Specifically, NAESB has developed Standard 001–13.1.5, which requires transmission service providers to include an available transfer capability information link on OASIS. This standard requires that transmission providers post several links on the available transfer capability information link, including links to their available transfer capability, capacity benefit margin and transfer reliability margin implementation documents.

150. Relying on the NAESB standards to require appropriate disclosure of the implementation documents should also resolve concerns for appropriate confidentiality protections. Standard 001–13.1.5 provides that the posting of information on the available transfer capability link would be ''subject to the Transmission Provider's ability to redact certain provisions due to market, security or reliability sensitivity concerns.'' In Order No. 890, the Commission acknowledged that a transmission provider may require someone seeking access to CEII material or proprietary customer information to sign a confidentiality agreement. The Commission expects that the provision in the NAESB standard for a transmission provider to redact sensitive information from postings to be implemented by a transmission provider subject to their OATT in a manner consistent with its obligation to make that information available to those with a legitimate need to access the information, subject to appropriate confidentiality restrictions. Nevertheless, any concerns about the NAESB business practices should be raised with NAESB itself.

151. Nevertheless, the Commission believes that the lists of required recipients of the implementation documents may be overly prescriptive and could exclude some registered entities with a reliability need to review such information. Accordingly, pursuant to section 215(d)(5) of the FPA and section 39.5(f) of our regulations, the Commission directs the ERO to develop a modification to the Reliability Standards pursuant to the ERO's Reliability Standards development process to require disclosure of the various implementation documents to any registered entity who demonstrates to the ERO a reliability need for such information.

b. Dispatch Model Assumptions

NOPR Proposal

152. In the NOPR, the Commission stated its belief that, subject to confirmation by NERC through its audit, the Reliability Standards will provide the necessary level of transparency and, therefore, the results of the available transfer capability calculations will be sufficiently accurate, consistent, equivalent and replicable. Aspects of the dispatch model to be used by transmission service providers using available transfer capability or available flowgate capability are addressed throughout the Reliability Standards. For example, Requirement R3.6 of MOD–001–1 requires transmission service providers to include in their implementation documents a description of how generation and transmission outages are to be considered in transfer of flowgate calculations. Requirement R9 of MOD–001–1 requires transmission service providers to provide, upon request, information related to unit commitments and order of dispatch, to include all designated network resources and other resources that are committed or have the legal obligation to run, as they are expected to run. Similarly, Requirement R6.1.2 of MOD–030–2 requires transmission service providers to consider unit commitment and dispatch order in the calculation of existing transmission capability.

Comments

153. Cottonwood and Entegra state that the Reliability Standards provide little detail and practically no guidelines on the dispatch model to be used in the available transfer capability or available flowgate capability calculations. Cottonwood contends that despite the lack of clear and measurable requirements, the dispatch model is the most significant factor in the calculation of available transfer capability and available flowgate capability values. Cottonwood further contends that additional detail will reduce the potential for manipulation of flowgate capabilities through the use of dispatch models that are not realistic and that, therefore, could lead to undue discrimination in access to the transmission system. To reduce the potential for undue discrimination and to improve the accuracy of the available transfer capability and available flowgate capability calculations, Cottonwood and Entegra ask the Commission to direct the ERO to develop detailed requirements for the dispatch model used in these calculations and establish measurements to evaluate compliance with the requirements.

154. Entegra contends that the Reliability Standards fail to comply with the requirement in Order No. 890 that reservations from a generator in excess of the generator's nameplate should not be simultaneously included in the calculation of existing transmission commitments.[93] Entegra argues that this may cause available transfer capability or available flowgate capability calculations to indicate unrealistic utilization of transmission capacity associated with over-generation. Entegra requests that the Commission require NERC to continue to work on a methodology for the appropriate treatment of over-generation. By contrast, ISO/RTO Council argues that the Commission

[92] The NAESB standards are approved concurrently with this Final Rule. *See Standards for Business Practices and Communication Protocols for Public Utilities*, Order No. 676–E, 129 FERC ¶ 61,162 (2009).

[93] *Citing* Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 254.

should not direct the ERO to modify the Reliability Standard to restrict reservations coming out of a generation source to the generation nameplate capacity of that facility. ISO/RTO Council contends that there is no reliability impact of generating above nameplate capacity because the generator cannot generate above its capacity. ISO/RTO Council contends that NAESB would be the appropriate organization to address the maximum reservation level and that the Commission should not interfere with the coordination efforts between NERC and NAESB.

155. Entegra contends that MOD–001–1 does not adequately address the modeling of transmission and generation outages in the models used for monthly available transfer capability calculations. Accordingly, Entegra asks the Commission to direct the ERO to modify MOD–001–1, Requirements R3.6 and R8, to provide clear guidelines on the duration and type of outages to be included in the calculation of monthly available transfer capability or available flowgate capability values to ensure that this process is transparent and consistent across the various regions. Entegra also contends that transmission service providers should be required to update models and available transfer capability or available flowgate capability values as soon as practicable after an event such as a generation or transmission outage or the discovery of an error in the calculations, rather than waiting for the next scheduled update.

156. Entegra contends that the Commission should direct the ERO to modify MOD–001–1 to require transmission operators or transmission service providers to periodically review, update, and benchmark their models to actual events used for available transfer capability or available flowgate capability calculations. Entegra points out that NERC, in its filing, argued that benchmarking is outside the scope of the ATC-related Reliability Standards. Entegra states that the updating and benchmarking of models to actual events are essential elements of the Commission's ATC reforms because they ensure that the available transfer capability or available flowgate capability values will be modeled as accurately as possible. Entegra contends that the Commission should require transmission operators and transmission service providers to examine in their benchmarking analyses whether their models result in unduly preferential or discriminatory treatment of any class of transmission customers or transmission service. Entegra also contends that the Commission should require transmission operators and transmission service providers to use the results of the benchmarking studies to make any necessary or appropriate adjustments to their models.

157. Entegra suggests that the benchmarking and updating requirements in the revised standard should ensure that transmission providers' available transfer capability and available flowgate capability models and methodologies comply with the accuracy expectations set forth in Order Nos. 693 and 890. Entegra also urges the Commission should direct the ERO to revise the Reliability Standards to specify the frequency with which transmission operators and transmission service providers must periodically review and update their models. Finally, Entegra asks the Commission to direct the ERO to develop a modification to the Reliability Standard that would allow stakeholders to comment on the results of such studies and participate in the review and updating of the available transfer and flowgate capability methodologies.

158. Cottonwood agrees that the MOD Reliability Standards should include a benchmarking process for available transfer capability models and results. Cottonwood contends that while an audit of the transmission service providers' implementation documents would help reduce the risk of undue discrimination, only an ongoing monitoring and benchmarking process that includes Commission and stakeholder input will protect against actual misstatements of available transfer capability values. Cottonwood states that it raised this issue during the stakeholder process but was informed that benchmarking will be addressed with future standards development efforts.

Commission Determination

159. With respect to the treatment of dispatch modeling assumptions, the Commission finds that the proposed requirements adequately address these issues by maintaining transmission service providers' discretion to model their systems effectively. As the Commission stated in the NOPR, requiring absolute uniformity in criteria and assumptions across all transmission service providers would preclude transmission service providers from calculating available transfer capability in a way that accommodates the operation of their particular systems. The Commission maintains that these Reliability Standards need not be so specific that they address every unique system difference or differences in risk assumptions when modeling expected flows. Each transmission service provider should retain some discretion to reflect unique system conditions or modeling assumptions in its available transmission capability methodology.[94] Any such system conditions or modeling assumptions, however, must be made sufficiently transparent and be implemented consistently for all transmission customers.

160. In Order No. 890, the Commission also expressed concern regarding the treatment of reservations with the same point of receipt (generator), but multiple points of delivery (load), in setting aside existing transmission capacity.[95] The Commission found that such reservations should not be modeled in the existing transmission commitments calculation simultaneously if their combined reserved transmission capacity exceeds the generator's nameplate capacity at the point of receipt. The Commission required the development of Reliability Standards that lay out clear instructions on how these reservations should be accounted for by the transmission service provider. The proposed Reliability Standards achieve this by requiring transmission service providers to identify in their implementation documents how they have implemented MOD–028–1, MOD–029–1, or MOD–030–2, including the calculation of existing transmission commitments.[96] Thus we will not direct the ERO to develop a modification to address over-generation, as suggested by Entegra. Nonetheless, in developing the modifications to the MOD Reliability Standards directed in this Final Rule, the ERO should consider generator nameplate ratings and transmission line ratings including the comments raised by Entegra and ISO/RTO Council.

161. Nevertheless, the Commission believes that these Reliability Standards

[94] Order No. 890–A, FERC Stats. & Regs. ¶ 31,261 at P 51.

[95] Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 245; Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 1033.

[96] MOD–001–1, Requirement R3.1. In its filing, NERC discusses several options should the Commission desire to impose a uniform approach regarding the treatment of reservations with the same point of receipt, but multiple points of delivery. *See* NERC August 29, 2008 Filing, Docket No. RM08–19–000, at 90–92. Neither Order No. 890 nor Order No. 693 directed that a single approach be adopted to account for such reservations and, instead, required only that instructions on how these reservations are accounted for by the transmission service provider be clearly laid out. *See* Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 245; Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 1033. The obligation of each transmission service provider to identify in its implementation document how they have implemented MOD–028–1, MOD–029–1, or MOD–030–2, including the calculation of existing transmission capacity, satisfies this requirement.

would benefit from benchmarking requirements, such as those described by Cottonwood and Entegra. Dispatch models should reflect technical analysis, i.e., sound engineering, as well as operating judgment and experience.[97] If so, the available transfer or flowgate capability forecasts should be close to actual values. However, changes in system conditions, among other variables, can cause differences between calculated and actual values for available transfer or flowgate capabilities. Such variations are to be expected. If, however, a transmission service provider's calculations consistently under- or over-estimate available transfer or flowgate capability, adjacent systems will be unable to effectively model their own transfer or flowgate capabilities, thus resulting in a degradation to the reliable operation of the Bulk-Power System.

162. In Order No. 890, the Commission directed public utilities, working through NERC, to modify MOD–010 through MOD–025 to incorporate a periodic review and modification of various data models.[98] The Commission found that updating and benchmarking was essential to accurately simulate the performance of the transmission grid and to calculate comparable available transfer capability values. On rehearing, the Commission clarified that the models used by the transmission provider to calculate available transfer capability, and not actual available transfer capability values, must be benchmarked.[99] Updating and benchmarking of models to actual events will ensure greater accuracy, which will benefit information provided to and used by adjacent transmission service providers who rely upon such information to plan their systems. Accordingly, pursuant to section 215(d)(5) of the FPA and section 39.5(f) of our regulations, the Commission directs the ERO to develop benchmarking and updating requirements to measure modeled available transfer and flowgate capabilities against actual values. Such requirements should specify the frequency for benchmarking and updating the available transfer and flowgate capability values and should require transmission service providers to update their models after any incident that substantially alters system conditions, such as generation outages.

163. The benchmarking and updating requirements directed herein need not be so specific that they set a maximum discrepancy between the model and the actual results. As stated above, a transmission service provider should retain some discretion to reflect unique system conditions or modeling assumptions in its available transmission capability methodology. There may be modeling assumptions or actual system conditions that result in wide variations between modeled values and actual results. The purpose of these benchmarking and updating available transfer and flowgate capability values is to increase accuracy by improving transparency. However, the Commission will not go so far as to direct a maximum discrepancy. Similarly, the Commission will not require these benchmarking and updating processes be open to stakeholder input once the requirements are in place. Allowing stakeholders to participate in a transmission service provider's modeling practices would place an undue burden on transmission service providers and threaten their ability to model their systems effectively.

164. The Commission also believes that the benchmarking requirements directed herein should not be designed or used by the ERO to monitor undue discrimination. Transmission providers within the Commission's FPA sections 205 and 206 jurisdiction are required to adhere to the Commission's open access and non-discrimination principles. If the information gathered pursuant to NERC's benchmarking requirements provides evidence of undue discrimination against a jurisdictional entity, such information should be brought to the Commission's attention either by the ERO or another entity with access to the modeling data. In response, the Commission may investigate the alleged behavior pursuant to its authority under sections 205 and 206 of the FPA.

c. Treatment of Network Resource Designations

NOPR Proposal

165. In the NOPR, the Commission observed that NERC has not explained its failure to include in each of the available transfer capability methodologies a requirement that base generation dispatch schedules will reflect the modeling of all network resources and other resources that are committed to or have the legal obligation to run, as they are expected to run. The Commission stated that it was therefore unclear whether the proposed Reliability Standards address the effect of available transfer capability on designating and undesignating a network resource. Although the Commission proposed to approve the proposed Reliability Standards as just and reasonable and an improvement on available transfer capability transparency, pursuant to section 215(d)(5) of the FPA and section 39.5(f) of our regulations, the Commission proposed to direct the ERO to develop a modification to the Reliability Standards to address these requirements.

Comments

166. NERC admits that MOD–029–1 does not address the designation of network resources, but states that requirement R3.1.3 of MOD–028–1 may address the Commission's concern by describing the key components to determining total transfer capability, namely: ''Unit commitment and dispatch order, to include all designated network resources and other resources that are committed or have the obligation to run.'' The Georgia Companies and Duke agree, also citing to the language of R3.1.3 of MOD–028–1. They also argue that MOD–030–2 reflects the modeling of network resources and other resources that have the obligation to run, citing to requirements R6.1.2 and R6.2.2, which contain language similar to requirement 3.1.3 of MOD–028–1. Northwest Utilities, Pacific Northwest state that they support the comments and arguments made by NERC.

167. Puget Sound contends that it is appropriate for the proposed Reliability Standards to require a model that best reflects expected conditions for the applicable horizon. Puget Sound argues that the proposed MOD Reliability Standards also should require disclosure of the generation profile or dispatch used in the total transfer capability and available transfer capability calculations. Puget Sound suggests that incorporating a blanket requirement built around the OATT-defined term ''designated network resource,'' will not ensure a model run that best reflects expected conditions. As an example, Puget Sound states that if a wind generation resource is designated as a network resource, such a designation would not guarantee that the generation is available. Likewise, Puget Sound states, designated resources are increasingly undesignated for monthly periods but are still run to supply native load using point-to-point

[97] *See* Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 5 (stating that in order for the Commission to determine that Reliability Standard is just and reasonable it must find, *inter alia,* that the Reliability Standard is designed to achieve a specified reliability goal and contains a technically sound means to achieve this goal).

[98] Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 290.

[99] Order No. 890–A, FERC Stats. & Regs. ¶ 31,261 at P 99.

or secondary service. Thus, Puget Sound contends, it is incorrect to assume that a designated network resource runs at a particular load level, based solely on its designation status. Rather, Puget Sound contends, the total transfer capability and available transfer capability calculations should simply correspond with expected conditions, including an expected dispatch and that the dispatch condition be transparent.

168. TAPS questions the language of the NOPR referring to the ''modeling of all designated network resources and other resources that are committed to or have the legal obligation to run, as they are expected to run.'' [100] TAPS contends that the first part of this clause could be interpreted as directing NERC to develop modified standards that adopt modeling assumptions as to use of network resources that fail to reflect the flexibility inherent in network service, which allows for economic dispatch of available resources. TAPS notes that, even if designated, a network resource does not have to operate. TAPS states that the second phrase ''as they are expected to run'' tempers this requirement, but asks the Commission to avoid being prescriptive in the Final Rule as to how network resource is to be modeled to avoid confusion.

169. TAPS also contends that the NOPR proposal does not expressly incorporate, or perhaps even leave room for, the concept articulated in Order No. 890–C of reexamining the Commission's undesignation requirements, and in particular the requirement of unit-specific undesignations for off-system sales of system power, in light of better information as to their practical impact on the realistic determination of available transfer capability. TAPS questions the usefulness of modifying the Reliability Standards to require unit-specific undesignations for resources used to serve off-system sales, suggesting that such undesignations on a day-ahead basis are not likely to usefully enhance the precision of available transfer capability calculations.

170. TAPS contends that the Commission should initiate a process to reexamine the interaction of network resource undesignation requirements with available transfer capability calculations. TAPS states that it would be contrary to the Commission's pro-competitive policies to discourage beneficial transactions, including firm system sales from entities other than the customer's host transmission provider, particularly if it is unlikely that available transfer capability calculations would be made significantly more precise by imposing unit-specific undesignation requirements on system sales where the supplier and purchaser do not take network service on the same transmission system. At a minimum, TAPS contends, the Final Rule should clearly afford NERC, through its standards development process, the flexibility to assess the impact of network resource designations and undesignations on available transfer capability determinations and report back to the Commission as to its assessment, along with modified Reliability Standards as appropriate. TAPS argues that a more flexible directive would enable NERC, through its standards development process, to access whether unit-specific network resource undesignations are, in fact, needed to allow transmission providers to determine available transfer capability when a network customer seeks to make a sale of system power to an off-system party.

Commission Determination

171. The Commission finds that MOD–028–1 and MOD–029–1 fail to address the directive in Order No. 693 to specify how transmission service providers should determine which generators should be modeled in service when calculating available transfer capability.[101] Specifically, the Commission directed the ERO to develop a modification to the Reliability Standards to specify that base generation schedules used in the calculation of available transfer capability will reflect the modeling of all designated network resources and other resources that are committed to or have the legal obligation to run, as they are expected to run, and to address the effect on available transfer capability of designating and undesignating a network resource.

172. NERC acknowledges that MOD–029–1 fails to address this directive. NERC and commenters cite to Requirement R3.1.3 of MOD–028–2 in support of arguments that the Reliability Standard reflects the modeling of designated network resources. That requirement, however, governs the calculation of total transfer capability, not existing transmission commitments. The only information provided as to the effect of designating and undesignating a network resource on existing transmission commitments is in Requirement R8 of MOD–028–1, which merely states that ''the firm capacity set aside for Network Integration Transmission Service'' will be included. The Reliability Standard fails to identify how that firm capacity will be calculated. By comparison, Requirements R6.1.2 and R6.2.2 of MOD–030–2 require transmission service providers to calculate existing transmission commitments by accounting for the impact of firm network service in their transmissions model based on, among other things, unit commitment and dispatch order that includes all designated network resources. Requirement R8 of MOD–001–1 further requires the transmission service provider to perform recalculations at specified frequencies to reflect changes over time.

173. The Commission therefore directs the ERO, pursuant to section 215(d)(5) of the FPA and section 39.5(f) of our regulations, to develop a modification to MOD–028–1 and MOD–029–1 to specify that base generation schedules used in the calculation of available transfer capability will reflect the modeling of all designated network resources and other resources that are committed to or have the legal obligation to run, as they are expected to run, and to address the effect on available transfer capability of designating and undesignating a network resource.

174. With regard to Puget Sound's concern regarding the modeling of designated network resources, as noted above MOD–030–2 requires transmission providers to account for the impact of firm network service in their transmission models. This requirement is flexible enough to allow transmission service providers to account for the variable nature of intermittent generation, as well as the economic dispatch of all resources, as noted by TAPS. To the extent either Puget Sound or TAPS have additional concerns regarding the development of MOD–028–1 and MOD–029–1 on this issue, they may pursue their concerns through the standards development process as NERC complies with the directives above.

175. The Commission finds that it is premature to consider revisiting its network resource policies to reflect the Reliability Standards adopted herein. As discussed above, MOD–028–1 and MOD–029–1 fail to address the directives in Order No. 693 to specify how transmission service providers should determine which generators should be modeled in service when calculating available transfer capability. It would therefore not be appropriate for the Commission to revisit network resource policies based on the current

[100] *Citing* NOPR, FERC Stats. & Regs. ¶ 32,641 at P 120.

[101] *See* Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 119.

version of those Reliability Standards. As NERC considers modification to these standards, TAPS may participate in the standards development process to address its concerns regarding the treatment of unit-specific network resource undesignations on the calculation of available transfer capability.[102]

d. Updating Available Transfer Capability and Available Flowgate Capability Values

NOPR Proposal

176. In the NOPR, the Commission proposed to approve MOD–001–1 including Requirement R8 and MOD–030–2, Requirement R10. These requirements require transmission service providers that calculate available transfer capability or available flowgate capability to recalculate those values at least one per hour for hourly values, once per day for daily values, and once per week for monthly values.

Comment

177. Entegra contends that the proposed Reliability Standard does not mandate any consistency or transparency regarding the timing of updates to available transfer capability calculations, nor does it require transmission service providers to consider whether such updates should be required more frequently for constrained facilities. Entegra states that while Requirement R8 of MOD–001–1 requires transmission service providers to update hourly, daily, and monthly available transfer capability values once every hour, day, or month, respectively, it does not set forth a deadline for such updates, nor does it require transmission service providers to disclose when such updates must occur, and that therefore the values may have become inaccurate by the time they are eventually disclosed. Accordingly, Entegra asks the Commission to direct the ERO to revise MOD–001–1, Requirement R8 to include a one-hour time limit for updates to daily and monthly available transfer capability values. In addition, Entegra asks the Commission to direct the ERO to modify the Reliability Standard to require transmission service providers to consider whether more frequent updates are necessary for constrained facilities.

178. Cottonwood contends that Requirement R8 of MOD–001–1 and Requirement R10 of MOD–030–2 do not address the procedures for determining whether unscheduled or unanticipated events, such as unplanned outages or the return of a major transmission line earlier than expected, justify the updating of available transfer capability values. Cottonwood argues that a lack of such procedures will result in inaccurate available transfer capability values and accompanying service issues. Cottonwood argues that, in the event of such a material change in system condition, available transfer capability or available flowgate capability values should be recalculated more often than proposed in the Reliability Standards. At a minimum, Cottonwood argues, the Commission should clarify that, for purposes of compliance with its OATT, a transmission service provider may not rely on these Reliability Standards as a ''safe harbor'' for its failure to make more frequent available transfer capability value adjustments as warranted by changes in system conditions.

Commission Determination

179. We agree that, in order to be useful, hourly, daily and monthly available transfer capability and available flowgate capability values must be calculated and posted in advance of the relevant time period. Requirement R8 of MOD–001–1 and Requirement R10 of MOD–030–2 require that such posting will occur far enough in advance to meet this need. With respect to Entegra's request regarding more frequent updates for constrained facilities, we direct the ERO to consider this suggestion through its Reliability Standards development process. Further, we agree with Cottonwood regarding unscheduled or unanticipated events. Therefore, pursuant to section 215(d)(5) of the FPA and section 39.5(f) of our regulations, we direct the ERO to develop modifications to MOD–001–1 and MOD–030–2 to clarify that material changes in system conditions will trigger an update whenever practical. Finally, we clarify that these Reliability Standards shall not be used as a ''safe harbor'' to avoid other, more stringent reporting or update requirements.

e. MOD–001–1, Consistent Treatment of Assumptions

NOPR Proposal

180. In the NOPR, the Commission expressed concern that the proposed Reliability Standards did not preclude a transmission service provider from using data and assumptions in a way that double counts their impact on available transfer capability and thereby skews the amount of capacity made available to others.[103] Although the Commission recognized that it may be appropriate for some variables to be factored into multiple components of the available transfer capability calculation, such as facility ratings, the Commission stated that the Reliability Standards do not require that assumptions affecting multiple components of the available transfer capability calculation are implemented in a way that is consistent with their actual effect on available transfer capability. Accordingly, the Commission proposed to direct the ERO, pursuant to section 215(d)(5) of the FPA and section 35.19(f) of its regulations, to modify the proposed Reliability Standards to ensure that they preclude a transmission service provider from using data and assumptions in a way that double counts their impact on available transfer capability.

Comments

181. ISO/RTO Council states that the double-counting issue has no measurable impact on the reliability of the Bulk-Power System and hence is outside the mandate of the ERO. ISO/RTO Council and Pacific Northwest contend that ensuring increased transparency of the implementation documents is not critical to reliability or within NERC's area of responsibility as the ERO. Separately, Midwest ISO contends that the Reliability Standards as written do not permit an entity to double count the impact of data and assumptions on available transfer capability calculations and recommends that the commission accept the Reliability Standards as proposed.

182. Likewise, Northwest Utilities and Pacific Northwest comment that the Commission's concern with double-counting is better addressed through a business practice than in the Reliability Standards. Northwest Utilities contends that even if a transmission service provider were to double-count in the manner the Commission suggests, commercial sales of transmission services would be impacted but not

[102] In Order No. 890–D, issued concurrently with this order, the Commission clarifies that, when *a buyer and seller of capacity from a network resource both take network service on the same transmission system and the power is delivered under section 31.3 of the pro forma Open Access Transmission Tariff (OATT) to another transmission system on which the buyer's network load is located, the seller may support the transaction by undesignating its resources on a system basis. Preventing Undue Discrimination and Preference in Transmission Service,* Order No. 890–D, 129 FERC ¶ 61,126 (2009).

[103] NOPR, FERC Stats. & Regs. ¶ 32,641 at P 107.

reliability. Northwest Utilities states that making less available transfer capability available than is possible does not imperil Bulk-Power System reliability because the system would be used even less than the extent of its capacity.

183. By contrast, TAPS supports the Commission's proposal to direct the ERO to modify the Reliability Standards to ensure that they do not allow a transmission service provider to use data and assumptions in a way that double counts their impact on available transfer capability. TAPS contends that transmission providers must not be permitted to calculate available transfer capability using data and assumptions that double count the impact of factors that would artificially decrease available transmission and create the appearance of constraints. TAPS also states that the NOPR proposal is consistent with Order No. 890's effort to enhance reliability and competition through more accurate and transparent calculation of available transfer capability.

Commission Determination

184. As proposed, MOD–001–1 does not restrict a transmission service provider from double counting data inputs or assumptions in the calculation of available transfer or flowgate capability. To the extent possible, available transfer or flowgate capability values should reflect actual system conditions. The double-counting of various data inputs and assumptions could cause an understatement of available transfer or flowgate capability values and, thus, poses a risk to the reliability of the Bulk-Power System. We note that, in the Commission's order accepting the associated NAESB business standards, issued concurrently with this Final Rule in Docket No. RM05–5–013, the Commission directs EPSA to address its concerns regarding the modeling of condition firm service through the NERC Reliability Standards development process.[104] We reaffirm here that modeling of available transfer capability should consider the effects of conditional firm service, including the potential for double-counting. Accordingly, pursuant to section 215(d)(5) of the FPA and section 39.5(f) of our regulations, the Commission directs the ERO to develop modifications to MOD–001–1 pursuant to the ERO's Reliability Standards development process to prevent the double-counting of data inputs and assumptions. In developing these modifications, the ERO should consider the effects of conditional firm service.

f. MOD–001–1, Requirement R2

NOPR Proposal

185. In the NOPR, the Commission proposed to approve MOD–001–1, including Requirement R2. Requirement R2 states that ''Each Transmission Service Provider shall calculate [available transfer capability] or [available flowgate capability] values as listed below using the methodologies selected by its Transmission Operator(s).'' A transmission service provider must calculate these values according to the following sub-requirements: R2.1 ''Hourly values for at least the next 48 hours;'' R2.2 ''Daily values for at least the next 31 days;'' and R2.3 states ''Monthly values for at least the next 12 months.''

Comment

186. Entergy requests clarification of the available transfer capability/available flowgate capability calculations that must be performed under Requirement R2 of MOD–001–1. Entergy states that it is unclear whether these sub-requirements dictate a minimum level of granularity in calculated available flowgate capability values and whether the sub-requirements overlap each other or are independent requirements. As an example, Entergy states that a transmission operator that calculates hourly values for the next 48 hours, under these sub-requirements, should meet the requirement and not be required to also calculate two, separate daily values for the time period captured by those hours. Thus, Entergy contends, the hourly values should be sufficient, in this example, to comply with the Reliability Standard without calculating any additional daily values.

187. Similarly, Entergy states that it is unclear whether, in addition to the calculation of daily available transfer capability values over the next 31 days, the transmission operator must also calculate monthly available flowgate capability values for the same period, or whether the transmission operator may simply calculate the daily values for the 31 days in the first month and then calculate monthly values for the remaining eleven months in the ''the next 12 months'' period. Entergy states that it believes that this is the intent of the requirements because of the use of the word ''next'' in Requirements R2.1, R2.2 and R2.3 as well as the parenthetical ''(months 2–13)'' in Requirement R2.3.

188. Entegra asks the Commission to direct the ERO to modify Requirement R2 to require transmission service providers to eliminate or minimize the use of inconsistent modeling practices over different timeframes. Entegra contends that if a transmission service provider determines that it is not feasible to use consistent modeling practices for all timeframes, the revised standard should require transmission service providers to identify and document differences in models and modeling practices due to available transfer capability/available flowgate capability calculation timeframes and provide a justification for each of the various modeling practices employed.

189. Entegra also asks the Commission to direct the ERO to modify Requirement R2.3 to clarify that transmission service providers that currently post available transfer capability or available flowgate capability values for a longer period should continue to do so. Entegra contends that failing to direct such a revision would allow the ERO to adopt a lowest common denominator rule in violation of Order No. 672.[105]

Commission Determination

190. Under Requirement R2 of MOD–001–1, transmission service providers must calculate hourly, daily and monthly values for available transfer capability or available flowgate capability. The requirement also sets a minimum frequency for such calculations. For example, a transmission service provider must calculate available transfer capability or available flowgate capability hourly for at least the next 48 hours. However, a transmission service provider calculating these values for a longer period would comply with the Reliability Standard. Thus, we reject the notion Requirement R2 represents the ''lowest common denominator.''

191. To the extent necessary, we clarify that the timeframes for calculating available transfer capability and available flowgate capability are not concurrent. A transmission service provider must calculate hourly values for the next 48 hours. Beyond those 48 hours, the transmission service provider must calculate daily values for at least the next 31 calendar days. And, beyond those 31 calendar days, a transmission service provider must calculate monthly values for at least the next 12 months (months 2–13). This understanding is supported by the fact that the ERO describes each period as the ''next''

[104] *Standards for Business Practices and Communication Protocols for Public Utilities,* Order No. 676–E, 129 FERC ¶ 61,162.

[105] *Citing* Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 329.

period and the next 12 months as months 2 through 13.

192. In its filing letter, NERC states that it requires applicable entities to calculate available transfer capability or available flowgate capability on a consistent schedule and for specific timeframes. In keeping with the Commission's goals of consistency and transparency in the calculation of available transfer capability or available flowgate capability, the Commission finds that transmission service providers should use consistent modeling practices over different timeframes. If a transmission service provider uses inconsistent modeling practices over different timeframes, that should be made explicit in its implementation document along with a justification for the inconsistent practices. Accordingly, pursuant to section 215(d)(5) of the FPA and section 39.5(f) of our regulations, the Commission directs the ERO to develop a modification to the Reliability Standard pursuant to its Reliability Standards development process requiring transmission service providers to include in their implementation documents any inconsistent modeling practices along with a justification for such inconsistencies.

g. MOD–001–1, Requirement R3

NOPR Proposal

193. In the NOPR, the Commission proposed to approve MOD–001–1, including Requirement R3, which requires transmission service providers to prepare and keep a current available transfer capability implementation document. Sub-requirement R3.5 requires the transmission service provider to include in the implementation document a description of the allocation processes used to allocate transfer or flowgate capability: (1) Among multiple lines or sub-paths within a larger available transfer capability path or flowgate; (2) among multiple owners or users of an available transfer capability path or flowgate; and (3) between transmission service providers to address issues such as forward looking congestion management and seams coordination.

Comment

194. Entergy requests that the Commission direct NERC to clarify that the applicability of these requirements is not triggered merely by participation in a seams agreement, but by the transmission service provider's participation in a seams agreement that also provides for a forward-looking congestion management process between one or more transmission service providers. Entergy states that some transmission service providers may be parties to seams agreements that do not address a forward-looking congestion management process or the allocation of flowgate capabilities among multiple owners or users. Under such circumstances, Entergy contends that the purposes of sub-requirement R3.5 would not be serviced by setting forth the details of such agreement in the available transfer capability implementation document.

Commission Determination

195. The Commission believes that Requirement R3 is sufficiently clear without making any distinction as to what sort of seams agreements or other type of agreement may be in place. If a seams agreement does not consider forward-looking congestion management or allocation of flowgate capabilities among multiple owners or users, the information posted under this requirement should so reflect. Participation in a seams agreement does not excuse a transmission service provider from complying with this requirement.

h. MOD–001–1, Requirements R6 and R7

NOPR Proposal

196. In the NOPR, the Commission proposed to approve MOD–001–1, including Requirements R6 and R7. Requirement R6 requires transmission operators calculating total transfer capability or total flowgate capability to use assumptions no more limiting than those used in the planning of operations for the corresponding time period studied, providing such planning of operations has been performed for that period. Similarly, Requirement R7 requires transmission service providers calculating available transfer capability or available flowgate capability to use assumptions no more limiting than those used in the planning of operations for the corresponding time period studied, providing such planning of operations has been performed for that period.

Comment

197. Entergy points out that, in Order No. 890, the Commission stated that it would adopt its ''NOPR proposal to require transmission providers to use data and modeling assumptions for the short- and long-term available transfer capability calculations that are consistent with that used for the planning of operations and system expansion, respectively, to the maximum extent possible.'' [106] Entergy also points out that, in Order No. 693, the Commission stated that the process and criteria ''used to determine transfer capabilities must be consistent with the process and criteria used for other users of the Bulk-Power System.'' [107] Entergy states that, as currently drafted, Requirements R6 and R7 do not specifically define ''planning of operations.'' Entergy also states that the phrase ''for the corresponding time period studied, providing such planning of operations has been performed for that period'' is unclear, making it difficult to determine the assumptions that may not be more limiting. Accordingly, Entergy asks the Commission to direct NERC to modify MOD–001–1, Requirements R6 and R7 to explicitly state whether the assumptions used for long-term planning, i.e., the assumptions used to plan for native load and reliability, can be no more limiting than the assumptions used to calculate available transfer capability or available flowgate capability and total transfer capability or total flowgate capability.

198. Entegra contends that the proposed Reliability Standard would permit transmission service providers to use a wide range of assumptions for available flowgate capability and total transfer capability or total flowgate capability calculations, which need not be consistent with those calculations used for different time periods, much less with the assumptions used for the planning of operations or system operations.

Accordingly, Entegra asks the Commission to direct the ERO to revise MOD–001–1 to require transmission service providers to use data and assumptions for their short-term and long-term available transfer capability or available flowgate capability and total transfer capability or total flowgate capability calculations that are consistent with (i.e., the same as) those used in the planning of operations and system expansion, respectively, to the maximum extent possible, as required by Order Nos. 693 and 890.[108] In addition, Entegra asks the Commission to direct the ERO to revise the requirements to explicitly require all transmission service providers to incorporate all data, modeling assumptions, and mitigation procedures used in operations planning and long-term expansion studies in their

[106] Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 292.

[107] *Citing* Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 758.

[108] *Citing Id.* P 1057; Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 292.

available flowgate capability and total transfer capability or total flowgate capability models and calculations.

199. Midwest ISO contends that the terms ''assumptions'' and ''no more limiting'' as used in Requirements R6 and R7 are not specific enough for entities to prepare for compliance. Midwest ISO states, for example, that it is unclear whether load assumption falls within the scope of ''assumption'' and, if so, which load assumption is deemed to be ''more limiting'' than another. Accordingly, Midwest ISO asks the Commission to direct the ERO to provide more specific details about what constitutes an ''assumption'' and to define the scope of the phrase ''no more limiting'' so that the Reliability Standard may be followed and audited with greater specificity.

Commission Determination

200. With regard to Midwest ISO's concern, while the terms ''assumptions'' and ''no more limiting'' as used in Requirements R6 and R7 could benefit from further granularity, we find these Requirements to be sufficiently clear for purposes of compliance. Likewise, with regard to Entegra's concern, we agree that transmission service providers should use data and assumptions for their available transfer capability or available flowgate capability and total transfer capability or total flowgate capability calculations that are consistent with those used in the planning of operations and system expansion. Under Requirements R6 and R7, transmission service providers and transmission operators must not overstate assumptions that are used in planning of operations. We believe these requirements are sufficiently clear as written. Nonetheless, we encourage the ERO to consider Midwest ISO's and Entegra's comments when developing other modifications to the MOD Reliability Standards pursuant to the ERO's Reliability Standards development procedure.

201. While Entergy is correct that the Standard does not define ''planning of operations,'' we do not find either that phrase or the phrase ''for the corresponding time period studied, providing such planning of operations has been performed for that period'' unclear. It is not necessary for this Reliability Standard to make an explicit statement about the assumptions used in long-term planning.

i. MOD–001–1, Requirement R9

NOPR Proposal

202. In the NOPR, the Commission proposed to approve MOD–001–1, including Requirement R9, which provides that ''[w]ithin thirty calendar days of receiving a request by any Transmission Service Provider, Planning Coordinator, Reliability Coordinator, or Transmission Operator for data * * * solely for the use in the requestor's [available transfer capability] or [available flowgate capability] calculations, each transmission service provider receiving said request shall begin to make the requested data available to the requestor, subject to the conditions specified in R9.1 and R9.2.'' Sub-requirement R9.2 provides that ''[t]his data shall be made available by the Transmission Provider on the schedule specified by the requestor (but no more frequently than once per hour, unless mutually agreed to by the requestor and the provider).''

Comments

203. Entergy asks NERC to clarify that, while the transmission provider must make the requested data available to the requestor according to the schedule specified by the requestor, the transmission provider is not obligated to provide the data on a more frequent basis than the transmission provider updates its available flowgate capability models. Entergy contends that this clarification would make sub-requirement R9.2 consistent with the apparent purpose of sub-requirement R9.1, which seeks to minimize the burden on the transmission service provider by requiring the transmission service provider to make the data available to a requestor in the format maintained by the transmission service provider.

204. Entergy states that the Reliability Standard does not require the exchange of data regarding counterflows and available transfer capability recalculation frequency and timing, as required by Order No. 890.[109] Entergy asks the Commission to direct the ERO to modify Requirement R9 to require transmission service providers to exchange such information. In addition, Entergy contends that the Reliability Standard should be revised to mandate periodic exchange of all model data and on-going coordination of available flowgate capability and total transfer capability or total flowgate data among adjacent transmission service providers, rather than only requiring such data exchange upon the request of a limited class of users of the Bulk-Power System.

[109] *Citing* Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 310.

Commission Determination

205. The Commission finds that, under Requirement R9 of MOD–001–1, a transmission service provider must respond to requests for data even when they are made more frequently than the transmission service provider updates its available transfer or flowgate capability models. If a request is made before the transmission service provider has updated its model, the transmission service provider must respond providing the same data as previously produced or making a statement that no change has been made. The Commission does not foresee this requirement as becoming a burden because a requestor is not likely to request more often than the calculation frequency if they are aware of the frequency with which the value is updated. Additionally, Requirement R9.2 addresses a maximum frequency for which any entity can request a given available transfer capability or flowgate value. For these reasons, the Commission will not direct the proposed modifications.

206. In response to Entergy's concern, the Commission believes that Requirement R9 is sufficiently clear insofar as it requires the exchange of data regarding counterflows and available transfer capability recalculation frequency and timing, as required by Order No. 890.[110] Requirement R9 requires transmission service providers to provide available transfer capability values for all available transfer capability paths. These values should include information on counterflows because, under Requirement R3.2 of MOD–001–1, a transmission service provider must include in its implementation documents a description of how it accounts for counterflows. Moreover, under Requirement R9.1, a transmission service provider must make its own data available for up to 13 months after receiving a request for data.

j. MOD–001–1, Counterflows

NOPR Proposal

207. In the NOPR, the Commission reiterated its concern from Order No. 890 regarding consistency in the use of counterflow assumptions in short-term and long-term calculations of available

[110] *Order No. 890,* FERC Stats. & Regs. ¶ 31,241 at P 310. The Commission found that the following data shall, at a minimum be exchanged among transmission providers for the purposes of available transfer capability modeling: (1) Load levels; (2) transmission planned and contingency outages; (3) generation planned and contingency outages; (4) base generation dispatch; (5) exiting transmission reservations, *including counterflows;* (6) available transfer capability recalculation frequency and times; and (7) source/sink modeling identification.

transfer capability.[111] The Commission noted, in the NOPR, that the MOD Reliability Standards achieve consistency by requiring each transmission service provider to identify in its available transfer capability implementation document how it accounts for counterflows and to calculate available transfer capability using assumptions no more limiting than those used in the planning of operations for the corresponding time period.

208. Requirement R3.2 of MOD–001–1 requires a transmission service provider to include in its available transfer or flowgate capability implementation document a description of the manner in which the transmission service provider will account for counterflows. The Commission expressed concern, however, that the Reliability Standards place no limit on the parameters the transmission service provider can use to account for counterflows. Accordingly, the Commission proposed to direct a review of the additional parameters and assumptions included by each transmission service provider in its implementation document and sought comment on whether additional requirements should be directed to eliminate the potential for undue discrimination in the provision of transmission service.

Comments

209. Entegra contends that the Commission should direct the ERO to modify Requirement R3.2 of MOD–001–1 to ensure that counterflows are modeled consistently and to require transmission service providers to provide a justification, along with work papers and analyses, for the counterflow percentage used in their calculations of firm and non-firm available transfer capability or available flowgate capability. Entegra contends that the Reliability Standard should also require each transmission service provider to measure and account for counterflows in a manner that reflects actual operations and system conditions. Accordingly, Entegra suggests that the Reliability Standard should require transmission service providers to benchmark the treatment of counterflows against actual events and to update the models and counterflow methodology. Entegra also suggests that the MOD–001–1 should require transmission service providers to adopt a methodology that will not restrict competition or result in unduly discriminatory treatment.

Commission Determination

210. As discussed above, the benchmarking of available transfer capability and available flowgate capability values and their components will provide information necessary to determine whether the calculations are being performed in a consistent manner. The audit of sub-requirement R3.1 directed above will address all parameters used to calculate available transfer capability or available flowgate capability that are necessary to validate the calculations. Furthermore, transmission service providers within the Commission's jurisdiction under section 205 of the FPA are already required to not adopt a methodology that will restrict competition or result in unduly discriminatory treatment. For these reasons, Entegra's suggested modifications of sub-requirement R3.2 are not necessary at this time.

2. MOD–004–1, Capacity Benefit Margin

NOPR Proposal

211. Requirements R5.1 and R6.1 of MOD–004–1 require transmission service providers to establish capacity benefit margin values for each path and flowgate that reflect consideration of both (i) studies provided by load-serving entities and resource planners demonstrating a need for capacity benefit margin and (ii) applicable reserve margin or resource adequacy requirements. In preparing their studies, Requirements R3.1 and R4.1 direct load-serving entities and resource planners to use one or more of the following to determine the generation capability import requirement: (i) Loss of load expectation studies, (ii) loss of load probability studies, (iii) deterministic risk-analysis studies, and/or (iv) applicable reserve margin or resource adequacy requirements. With regard to the allocation and use of transmission capacity set aside as capacity benefit margin, Requirement R1.3 requires the transmission service provider to include in its capacity benefit margin implementation document the procedure for a load-serving entity or balancing authority to use transmission capacity set aside as capacity benefit margin, including the manner in which the transmission service provider ''will manage'' situations where the requested use of capacity benefit margin exceeds the capacity benefit margin available.

212. In the NOPR, the Commission expressed concern that, as proposed, the Reliability Standard would allow a transmission service provider to calculate, allocate, and use capacity benefit margin in a way that impairs the reliable operation of the Bulk-Power System. The Commission explained that, under the Reliability Standard, the transmission service provider is to ''reflect consideration'' of studies provided by load-serving entities and resource planners demonstrating a need for capacity benefit margin and ''manage'' situations where the requested use of capacity benefit margin exceeds the capacity benefit margin available. The Commission observed that the Reliability Standard places no bounds on this ''consideration'' and ''management'' and, for example, would permit a transmission service provider to make decisions regarding the use of capacity benefit margin based solely on economic considerations notwithstanding a demonstration of need for capacity benefit margin by a load-serving entity or resource planner. The Commission therefore proposed, pursuant to section 215(d)(5) of the FPA and section 39.5(f) of our regulations, to direct the ERO to develop a modification to the Capacity Benefit Margin Methodology (MOD–004–1) to ensure that the Reliability Standard would not allow a transmission service provider to calculate, allocate, and use capacity benefit margin in a way that impairs the reliable operation of the Bulk-Power System.

213. The Commission also expressed concern regarding references to applicable reserve margin and resource adequacy requirements in the determination of the generation capability import requirements by load-serving entities and resource planners under Requirements R3.1 and R4.1. The Commission stated that, under the phrasing of those provisions, load-serving entities and resource planners must determine their generation capability import requirement by using one or more of loss of load expectation studies, loss of load probability studies, deterministic risk-analysis studies, and applicable reserve margin or resource adequacy requirements. As a result, the Commission commented, a load-serving entity or resource planner could rely solely on reserve margin and resource adequacy requirements to demonstrate a need for capacity benefit margin without any analysis of loss of load expectations, loss of load probabilities, or deterministic risk. In comparison, the Commission observed that Requirements 5.1 and 6.1 obligate the transmission service provider to consider *both* the studies provided by load-serving entities and resource

[111] NOPR, FERC Stats. & Regs. ¶ 32,641 at p. 91; Order No. 890, FERC Stats. & Regs. ¶ 31,241 at p. 292–93; Order No. 693, FERC Stats. & Regs. ¶ 31,242 at p. 1039.

planners and applicable reserve margin and resource adequacy requirements when calculating capacity benefit margin and allocating it to particular paths or flowgates. The Commission therefore proposed, pursuant to section 215(d)(5) of the FPA and section 39.5(f) of our regulations, to direct the ERO to develop a modification to MOD–004–1 to require load-serving entities and resource planners to determine generation capability import requirements by reference to relevant studies and applicable reserve margin or resource adequacy requirements, as relevant.

Comments

214. NERC objects to the Commission's proposed modification to MOD–004–1. To address a perceived disparity in MOD–004–1, NERC explains that, based on stakeholder guidance, it determined that the actual manner in which a load-serving entity or resource planner determines its generation capability import requirement may differ significantly based on the requestor's internal practices, as well as the regulatory regime under which it operates. NERC states that the use of the words ''one or more'' in the Reliability Standard was intended to indicate that an entity desiring to have capacity benefit margin withheld for its potential use could establish that need using any one of the methods described. NERC states that the entity also has the option to provide additional studies or information if it so desired or was obligated to do so. In the case of a transmission service provider or transmission planner, however, NERC states that the Reliability Standard drafting team felt that it was important that any information provided be considered when establishing an appropriate level of capacity benefit margin.

215. Georgia Companies contend that a transmission service provider cannot ensure that the calculation of capacity benefit margin would not impair the reliable operation of the Bulk-Power System because that would require ensuring resource adequacy, which a transmission service provider cannot do. Georgia Companies state that a transmission service provider must rely on resource adequacy information provided by load serving entities when managing transmission reliability. Therefore, Georgia Companies contend that the Commission should accept the NERC-proposed language in MOD–004–1 that transmission providers reflect consideration of any studies received from customers.

216. Georgia Companies also state that, on its surface, it appears that MOD–004–1 appears inconsistent by allowing a load serving entity or resource planner to perform one or more of the listed options while requiring a transmission service provider or transmission planner to use all options. Nevertheless, Georgia Companies contend that the requirements are accurate and consistent as written because the relevant studies are not applicable in all regions. Thus, Georgia Companies ask the Commission to not direct the ERO to develop a modification to MOD–004–1 to require load serving entities and resource planners to determine generation capability import requirements by reference to relevant studies and applicable reserve margin or resource adequacy requirements. If the Commission does direct such action, Georgia Companies contend that it could require a load serving entity or resource planner to perform studies that are not required (nor applicable or used) by multiple State agencies, RTOs, ISOs, or other regional authorities.

217. Midwest ISO expresses concern that the Reliability Standards drafting team interpreted the language from Order Nos. 890 and 693 such that a load serving entity's request to set aside capacity benefit margin is final, and that no input is permitted by the transmission service provider, even if the load serving entity is part of an ISO or RTO. Midwest ISO contends that this interpretation could result in an unreasonable over-reservation of capacity benefit margin, considering the scant likelihood of actual impairment of the reliability of the system. Midwest ISO contends that the benefit to system reliability that would result from setting aside capacity benefit margin for a low-probability scenario is outweighed by the complexity of compliance with an inflexible interpretation of the Commission's orders. Thus, Midwest ISO asks the Commission to direct the ERO to consider the transmission service provider's role in assessing the total amount of capacity benefit margin reasonably required to preserve the reliability of the system.

218. TAPS supports the Commission's proposal to direct the ERO to develop modifications to the Reliability Standard that require capacity benefit margin set-asides to determine generation capability import requirements by reference to relevant studies and applicable reserve margin or resource adequacy requirements, as relevant. TAPS expresses concern, however, that the NOPR proposal could be interpreted as requiring load-serving entities and resource planners to perform such assessments even if they are not requesting that transmission be set aside for capacity benefit margin. Accordingly, TAPS asks the Commission to clarify that Requirements R3 and R4 of MOD–004–1 require performance assessments only by those load-serving entities and resource planners that are requesting capacity benefit margin to be set aside.

219. The ITC Companies also support the Commission's proposed modification to MOD–004–1. The ITC Companies state that they agree with the Commission that the requirement that the transmission service provider is to ''reflect consideration'' of studies provided by the load serving entity or resource planning in establishing the capacity benefit margin under MOD–004–1 is not specific enough and results in an unbounded requirement. The ITC Companies contend that it is not a burdensome request for the load-serving entity or resource planner to provide a detailed study to support the generator capability import requirement used in setting the capacity benefit margin.

Commission Determination

220. We agree with NERC that a transmission service provider should consider any information provided in establishing an appropriate level of capacity benefit margin. Similarly, we agree with the Georgia Companies that all relevant information should be considered in establishing an appropriate level of capacity benefit margin, including information provided by customers. However, in determining the appropriate generation capacity import requirement as part of the sum of capacity benefit margin to be requested from the transmission service provider, it would not be appropriate for a load-serving entity or resource planner to rely exclusively on a reserve margin or adequacy requirement established by an entity that is not subject to this Standard. Thus, we hereby adopt the NOPR proposal to direct the ERO to develop a modification to Requirements R3.1 and R.4.1 of MOD–004–1 to require load-serving entities and resource planners to determine generation capability import requirements by reference to one or more relevant studies (loss of load expectation, loss of load probability or deterministic risk analysis) *and* applicable reserve margin or resource adequacy requirements, as relevant. Such a modification should ensure that a transmission service provider has adequate information to establish the appropriate level of capacity benefit margin.

221. In response to TAPS concerns, we believe that the Reliability Standard is sufficiently clear that load-serving entities and resource planners who do not request capacity benefit margin be set aside are not required to perform the studies prescribed in MOD–004–1. Requirements R3 and R4 require load-serving entities and resource planners determining the need for transmission capacity to be set aside as capacity benefit margin for imports into balancing authority to use certain studies. Thus, if a load-serving entity or resource planner is not determining such a need because it chooses not to request capacity benefit margin to be set aside, there is no obligation to use the studies listed in Requirements R3.1 and R4.1. Moreover, the requirement is to ''use'' the listed studies. Thus, a load-serving entity or resource planner could use a study that has been conducted by another entity, such as an ISO or RTO.

222. We agree with the Midwest ISO that ISOs, RTOs, and other entities with a wide view of system reliability needs should be able to provide input into determining the total amount of capacity benefit margin required to preserve the reliability of the system. However, Requirements R1.3 and R7 already make clear that determinations of need for generation capability import requirement made by a load serving entity or resource planner are not final. Further, the third bullet of Requirements R5 and R6 explicitly lists reserve margin or resource adequacy requirements established by RTOs and ISOs among the factors to be considered in establishing capacity benefit margin values for available transfer capability paths or flowgates used in available transfer capability or available flowgate capability calculations. In fact, it is for this reason that we uphold the NOPR proposal. Therefore, pursuant to section 215(d)(5) of the FPA and section 39.5(f) of our regulations, the Commission directs the ERO to modify MOD–004–1 to clarify the term ''manage'' in Requirement R1.3. This modification should ensure that the Reliability Standard clarify how the transmission service provider will manage situations where the requested use of capacity benefit margin exceeds the capacity benefit margin available.

3. MOD–008–1, Transfer Reliability Margin

NOPR Proposal

223. In the NOPR, the Commission proposed to approve Reliability Standard MOD–008–1 without modification.

Comments

224. Entegra states that the Reliability Standard does not establish a maximum transmission reserve margin, as required by Order No. 890. Entegra states that the Reliability Standard gives transmission operators unbounded discretion to adopt whatever transmission reserve margin they choose, without placing any substantive limits on parameters, modeling requirements, criteria, or assumptions used to calculate the transmission reserve margin. Accordingly, Entegra asks the Commission to direct the ERO to establish a maximum transmission reserve margin. Entegra points out that the Commission found, in Order No. 890, that the ''percentage of ratings reduction'' method is a reasonable method because it is relatively simple to apply and does not restrict transmission operators from using a more sophisticated method if appropriate.

Commission Determination

225. The Commission will not direct that a maximum transmission reserve margin be established here. Although the Commission previously stated that the ''percentage of ratings reduction'' method is reasonable, the Commission does not believe that it is necessary to fix a maximum value or percentage of transfer capability set aside as transmission reserve margin. As stated above, the Commission believes that it is appropriate for transmission service providers to retain some level of discretion. We believe that transmission service providers should retain the discretion to manage risks associated with their particular system configurations and physical limitations. Nonetheless, we believe that it would be inappropriate for a transmission service provider to set transmission reserve margin excessively and unjustifiably high. The transparency set by these MOD Reliability Standards will allow the Commission, NERC and other to monitor transmission reserve margin values to determine if they are reasonable and internally consistent. The Commission will evaluate evidence of excessive transmission reserve margins on a case-by-case basis as reports of any such occurrences arise. The Commission, therefore, declines to direct the proposed modification to MOD–008–1.

4. MOD–028–1, Area Interchange Methodology

226. In the NOPR, the Commission proposed to approve Reliability Standard MOD–028–1 without modification.

a. General

Comments

227. FPL points out that the introduction to MOD–028–1 provides that the area interchange methodology is characterized by determination of incremental transfer capability via simulation, from which total transfer capability can be mathematically derived. FPL contends that mathematical derivation of total transfer capability is overly simplistic for implementation. FPL explains that the simple mathematical additions and subtractions ignore the interactions between existing commitments going between different balancing authorities as well as the different distribution factors that various existing commitments may have on different flow gates.

Commission Determination

228. FPL did not adequately explain its concern about the mathematics required to derive total transfer capability. The Commission does not intend to force any party to implement an unrealistically simplistic methodology, and notes that Requirement R1 provides parties using the area interchange methodology the latitude to specify the manner of computation necessary to allow other parties to validate the computation.

b. MOD–028–1, Requirement R2

NOPR Proposal

229. In the NOPR, the Commission proposed to approve MOD–028–1, including Requirement R2, which provides that, when calculating total transfer capability for available transfer capability paths, transmission operators must use a transmission model that contains modeling data and topology of its reliability coordinator's area of responsibility, modeling data and topology (or equivalent representation) for immediately adjacent and beyond reliability coordination areas, and facility ratings specified by the generator owners and transmission owners.

Comments

230. FPL points out that sub-requirement R2.2 requires the use of ''modeling data and topology (or equivalent representation) for immediately adjacent and beyond Reliability Coordination areas.'' FPL contends that the term ''beyond'' is vague and subject to different interpretation. Accordingly, FPL asks the Commission to direct the ERO to address this ambiguity.

Commission Determination

231. The Commission understands sub-requirement R2.2 of MOD–028–1 to mean that, when calculating total transfer capability for available transfer capability paths, a transmission operator shall use a transmission model that includes relevant data from reliability coordination areas that are not adjacent. While we believe that the provision is reasonably clear, the Commission agrees that the term ''and beyond'' could be better explained. Accordingly, pursuant to section 215(d)(5) of the FPA and section 39.5(f) of our regulations, the Commission directs the ERO to develop a modification sub-requirement R2.2 pursuant to its Reliability Standards development process to clarify the phrase ''adjacent and beyond Reliability Coordination areas.''

c. MOD–028–1, Requirement R5

NOPR Proposal

232. In the NOPR, the Commission proposed to approve MOD–028–1 including Requirement R5, which requires transmission operators to establish total transfer capability for each available transfer capability path according to the following schedule: (1) At least once within the seven calendar days prior to the specified period for total transfer capabilities used in hourly and daily available transfer capability calculations; (2) at least once per calendar month for total transfer capabilities used in monthly available transfer capability calculations; and (3) within 24 hours of the unexpected outage of a 500 kV or higher transmission facility or transformer with a low-side voltage of 200 kV or higher for total transfer capabilities in effect during the anticipated duration of the outage, provided such outage is expected to last 24 hours or longer.

Comment

233. FPL comments that sub-requirement R5.2 provides that total transfer capability be established ''[w]ithin 24 hours of the unexpected outage of a 500 kV or higher transmission Facility or transformer with a low-side of 200 kV or higher for [total transfer capabilities] in effect during the anticipated duration of the outage.'' FPL contends that this sub-requirement is too restrictive and burdensome in certain situations. As an example, FPL states that meeting this requirement will be difficult if a facility is expected to be out of service for an extended time frame, e.g., a catastrophic transformer failure which could take a year to replace. FPL asks the Commission to consider a graduated time frame for reposting where hourly data for the next 168 hours would be reposted within 24 hours; the following 23 days of daily data would be reposted within 48 hours; and, the 13 months of monthly data would be reposted within five working days. FPL contends that this would allow time for the extent of the damage to be determined and proper assessments of replacement times to be established.

Commission Determination

234. The Commission believes that, as written, the time frames established in Requirement R5 are just and reasonable because they balance the need to reliably operate the grid with the burden on transmission operators to recalculate total transfer capability even when total transfer capability does not often change. Nevertheless, the Commission agrees that a graduated time frame for reposting could be reasonable in some situations. Accordingly, the ERO should consider this suggestion when making future modifications to the Reliability Standards.

d. MOD–028–1, Requirement R6

NOPR Proposal

235. Requirement R6 of MOD–028–1 requires transmission service providers to establish total transfer capability for each available transfer capability path by use of process specified in the sub-requirements. Requirement R6.1 requires transmission operators to determine the incremental transfer capability for each available transfer capability path by increasing generation and/or decreasing load within the source balancing authority area and decreasing generation and/or increasing load within the balancing authority area until either: A system operating limit is reached on the transmission service provider's system or a system operating limit is reached on any other adjacent system in the transmission model that is not on the study path and the distribution factor is 5 percent or greater.

Comments

236. Regarding sub-requirement R6.1, FPL contends that the 5 percent or less distribution factor should apply regardless of whether the limitation is on the study path or on an adjacent system. FPL contends that allowing application of the 5 percent distribution factor only on adjacent systems will create confusion and will cause inconsistent available transfer capability postings depending on who is calculating the path. FPL also points out that the footnote for sub-requirement R6.1 states that a distribution factor applied in R6.1 can be less than 5 percent. FPL contends that once a distribution factor is selected it should be applied for all paths so that there is not a different distribution factor for different paths. FPL further contends that the distribution factor to be used should be clearly stated in the available transfer capability implementation document.

Commission Determination

237. The Commission agrees that any distribution factor to be used should be clearly stated in the implementation document, and that to facilitate consistent and understandable results the distribution factors used in determining total transfer capability should be applied consistently. Accordingly, pursuant to section 215(d)(5) of the FPA and section 39.5(f) of our regulations, the Commission directs the ERO to develop a modification to MOD–028–1 pursuant to its Reliability Standards development process to address these two concerns.

5. MOD–029–1, Rated System Path Methodology

a. Sub-Requirement R2.7

NOPR Proposal

238. In the NOPR, the Commission stated that NERC failed to explain, and it was not clear why certain applicable entities would be required to use pre-1994 total transfer capability values under sub-requirement R2.7 in the Rated System Path Methodology. The Commission expressed concern that requiring pre-1994 total transfer capability values to remain in place without adequate explanation essentially exempts certain paths from the total transfer capability requirements in the Rated System Path Methodology and may result in total transfer capability values that are incorrectly based on stale assumptions and data. Accordingly, the Commission sought comment on whether it should direct the ERO to develop a modification to the Rated System Path Methodology (MOD–029–1) to remove sub-requirement R2.7 as unsupported.

Comments

239. Many commenters contend that the Commission should retain sub-requirement R2.7 of MOD–029–1.[112] Some urge the Commission to give due weight to the technical expertise of the ERO with respect to the inclusion of

[112] *E.g.,* EEI, Northwestern, Northwest Utilities, LADWP, Avista, Modesto, Pacific Northwest, PacifiCorp, Puget Sound, SMUD, Salt River, SWAT, TANC and Tucson.

sub-requirement R2.7.[113] Commenters explain that the path-rating methodology in MOD–029–1 represents the current methodology for calculating available transfer capability by entities operating within the area of the Western Electricity Coordinating Council (WECC). They contend that although these values can be based on pre-1994 total transfer capability values, they must be updated seasonally within WECC and, thus, are not stale.[114]

240. Northwestern claims that the basic premise of the WECC rating process is that new path ratings or a new rating for an upgraded path should not adversely impact the transfer capability of a path with either an accepted or existing rating. If a path's transfer capability is adversely impacted, Northwestern states that the owners of the path seeking the rating would have to mitigate the impacts. Likewise, Pacific Northwest, Public Power Council and Snohomish state that the Existing Paths within WECC are reviewed by the WECC Planning Committee and annually by the WECC Operating Committee to assign an appropriate system operating limit for each path. As such, they contend, the Existing path rating cannot yield total transfer capability or available transfer capability values in excess of the technically based seasonal system operating limit. SMUD notes that the industry has been using this system for fifteen years and, in that time, no one operating under these limits has filed any complaint, formal challenge, or request for a change.

241. Some commenters argue that it would place extreme burden on WECC to re-rate all the paths in its path rating catalog that have an Existing Rating [115] or Other designation; a total of 45 paths.[116] Northwestern contends that requiring Existing Rating paths to go through some new process could seriously undermine the reliability and economic value the path owners have appropriately built into their long-range plan. Similarly, PacifiCorp argues that removal of sub-requirement R2.7 would hinder path ratings already in progress and negatively impact reliance on transmission rights because many WECC path ratings are dependent upon parallel interactions and ratings with the parallel facilities owned by other transmission providers. Thus, PacifiCorp and Northwest Utilities contend, if sub-requirement R2.7 is removed, there will be likely be multiple contract disputes. Furthermore, if the Commission directs removal of requirement R2.7 from MOD–030–2, PacifiCorp contends that it will be impossible for entities to meet the one-year implementation schedule. Some commenters contend that the existing total transfer capabilities are operationally proven and that re-rating the paths within WECC would divert resources from higher reliability priorities for several years for no apparent reliability benefit.[117]

242. By contrast, ISO/RTO Council supports the removal of sub-requirement R2.7. ISO/RTO Council states that requiring pre-1994 total transfer capability values to remain in place without adequate explanation essentially exempts certain paths from the total transfer capability requirements in the Rated System Path Methodology and may result in total transfer capability values that are incorrectly based on stale assumptions and criteria. To avoid continuance of or reversion to the pre-1994 total transfer capability value for a path under sub-requirement R2.7, ISO/RTO Council states that each RTO and ISO would be required to conduct comprehensive and time consuming studies of the paths they operate within a one-year period. ISO/RTO Council contends that it would be unreasonable to require that this level of effort in the absence of any explanation by NERC why such studies are necessary or what benefit it believes will result. Accordingly, ISO/RTO Council asks the Commission to direct the ERO to remove this sub-requirement.

Commission Determination

243. The Commission approves Requirement R2.7 as proposed by NERC. As commenters note, although some total transfer capability values were developed for paths prior to 1994, WECC regularly reviews these paths to confirm that those values remain valid. Moreover, WECC requires re-rating of a Rated System path in a variety of instances.[118] As a result, we find that commenters have provided sufficient evidence that the use of pre-1994 total transfer capability values for paths within WECC does not exempt those paths from the total transfer capability requirement in the Rated System Path Methodology. We are further satisfied that ratings for existing paths with pre-1994 total transfer capability values are not incorrectly based on stale assumptions because the existing path ratings must be adjusted for seasonal variances.

244. Although Requirement R2.7 appears to have been crafted to accommodate existing practices within WECC, the Commission points out that MOD–029–1 is a national Reliability Standard. Thus, the requirement is equally binding upon transmission operators and transmission service providers using the Rated System Path Methodology to calculate total transfer capabilities or available transfer capabilities for path outside of WECC. The Commission therefore clarifies that any transmission operator or transmission service provider operating outside of WECC that uses the Rated System Path Methodology must demonstrate to the ERO and the Commission a similar need to implement Requirement R2.7.

b. Counterschedules

Comment

245. Puget Sound comments that counterflows are a mandatory component of the available transfer capability formula but contends that it is common practice in the Western Interconnection to incorporate counterschedules into non-firm available transfer capability calculations, instead of counterflows as defined in the formula. Puget Sound therefore requests that the Commission clarify in the Final Rule that using counterschedules will not be considered a violation of MOD–029–1. In addition, Puget Sound asks the Commission to clarify that counterflows and counterschedules are interchangeable terms, consistent with Western Interconnection practices.

[113] *E.g.,* EEI, Pacific Northwest, Public Power Council and SMUD.

[114] *E.g.,* EEI, Northwestern, Northwest Utilities, LADWP, Avista, Modesto, Pacific Northwest, PacifiCorp, Puget Sound, SMUD, Salt River, SWAT, TANC and Tucson.

[115] Existing Ratings are defined by WECC as transmission path ratings that were known and used in operation as of January 1, 1994. *See,* WECC, *Overview of Policies and Procedures for Regional Planning Project Review, Project Rating Review, and Progress Reports (Revised April 2005), available at http://www.wecc.biz/library/WECC%20Documents/Miscellaneous%20Operating%20and%20Planning%20Policies%20and%20Procedures/Overview%20Policies%20Procedures%20RegionalPlanning%20ProjectReview%20ProjectRating%20Progress Reports_07-05.pdf.*

[116] *E.g.,* Modesto, Northwestern, Northwest Utilities, Nevada Companies, Pacificorp, and TANC.

[117] *E.g.,* Avista, LADWP, Modest, Salt River, SWAT, TANC, and Tucson.

[118] *See* WECC, *Overview of Polices and Procedures for Regional Planning Project Review, Project Rating Review, and Progress Reports* (Revised April 2005), Sect. 2.3 Paths Subject To This Procedure, *available at: http://www.wecc.biz/library/WECC%20Documents/Miscellaneous%20Operating%20and%20Planning%20Policies%20and%20Procedures/Overview%20Policies%20Procedures%20RegionalPlanning%20ProjectReview%20ProjectRating%20ProgressReports_07-05.pdf.*

Commission Determination

246. Puget Sound's request is reasonable, and insofar as calculating non-firm available transfer capability using counterschedules as opposed to counterflows achieves substantially equivalent results, using them will not be considered a violation. However, we do not have enough information to determine that the terms are generally interchangeable in all circumstances. The ERO should consider Puget Sound's concerns on this issue when making future modifications to the Reliability Standards.

6. MOD–030–2, Flowgate Methodology

247. In the NOPR, the Commission proposed to approve MOD–030–2 without modification. Because MOD–030–2 wholly superseded MOD–030–1, NERC proposed to make the Reliability Standard effective on the same date upon which MOD–030–1 would have become effective. Thus, the Commission proposed to approve MOD–030–2 with an effective date set as the first day of the first quarter no sooner than one calendar year after approval of the Reliability Standard and its related three standards (MOD–001–1, MOD–028–1, and MOD–29–1).

a. MOD–030–2, Requirements R2.4 and R2.5

NOPR Proposal

248. In the NOPR, the Commission proposed to approve MOD–030–2, including sub-requirements R2.4 and R2.5. Sub-requirement R2.4 provides that the transmission operator shall, at a minimum, establish the total flowgate capability of each of the defined flowgates as equal to: (1) For thermal limits, the system operating limit, of the flowgate; and (2) for voltage or stability limits, the flow that will respect the system operating limit of the flowgate. Sub-requirement R2.5 provides that the transmission operator shall, at a minimum, establish the total flowgate capability once per calendar year.

Comments

249. Entergy states that it interprets sub-requirements R2.4 and R2.5 as requiring an annual reevaluation to confirm the total flowgate capability of a defined flowgate is correctly set at the system operating limit of the flowgate based on thermal limits or the appropriate flow that will respect the system operating limit of the flowgate based on voltage or stability limits. Entergy contends that, when considered with sub-requirement R2.4, sub-requirement R2.5 could create confusions as to whether, as part of the annual ''re-establishment'' of the total flowgate capability, the transmission operators must first re-establish the system operating limit of each defined flowgate. Entergy states that the studies and tests that must be performed to establish the system operating limit of a set of transmission facilities typically require significant time and resources, and it is unlikely that they could be completed for all flowgates within one year. Accordingly, Entergy requests clarification that, as part of the annual establishment of the total flowgate capability of a flowgate, the transmission operator is not required to re-rate transmission facilities on an annual basis.

Commission Determination

250. The Commission finds that, under sub-requirements R2.4 and R2.5, transmission operators are not required to update system operating limits of each flowgate when establishing the annual total flowgate capability. However, as per sub-requirement R2.5.1, the transmission operator should update the total flowgate capability within seven calendar days of the notification if it is notified of a change in the rating by the transmission owner that would affect the total flowgate capability of a flowgate used in the available flowgate capability process.

b. MOD–030–2, Requirements R3 and R10

NOPR Proposal

251. The Commission proposed, in the NOPR, to approve MOD–030–2 including Requirements R3 and R10. Requirement R3 requires the transmission operator to make available to the transmission service provider a transmission model to determine available flowgate capability that meets the criteria provided in the sub-requirements. Requirement R10, and its sub-requirements, provides that each transmission service provider shall recalculate available flowgate capability, utilizing the updated models described in sub-requirements R3.2, R3.3 and Requirement R5, at a minimum on the following frequency unless none of the calculated values identified in the available flowgate capability equation have changed: For hourly availability flowgate capability, once per hour; for daily availability flowgate capability, once per day; and for monthly availability flowgate capability, once per week. Sub-requirements R3.2 and R3.3 require that the transmission operator make available to the transmission service provider a transmission model for determination of availability flowgate capability that is: Updated at least once per day for availability flowgate capability for intra-day, next day, and days two through thirty; and updated at least once per month for availability flowgate capability calculations for months two through thirteen. Requirement R5 addresses further requirements for data included in the models.

Comment

252. Entergy states that it understands sub-requirements R3.2 and R3.3 as establishing a requirement that the transmission model used by the transmission service provider must be updated, or resolved, with a frequency of once a day and/or once per month, according to the applicable availability flowgate capability calculation. On the other hand, Entergy notes, Requirement R10 establishes requirements that the transmission service provider recalculates availability flowgate capability by algebraically decrementing or incrementing availability flowgate capability values as appropriate, using the most recently updated transmission model on a more frequent basis. Entergy requests clarification that the transmission model used in the available flowgate capability calculations does not need to be updated more frequently than under the timelines set forth in sub-requirements R3.2 and R3.3, i.e., that the transmission model itself does not need to be updated according to the timelines in Requirement R10, which would only apply to the recalculation of availability flowgate capability values.

Commission Determination

253. The Commission finds that sub-requirements R3.2 and R3.3 set the frequency by which the transmission model used in the available flowgate capability calculations needs to be updated. Transmission operators are not required to update the transmission model more frequently than prescribed in these sub-requirements. Under requirement R10, transmission service providers must use the transmission models provided by transmission operators to recalculate available flowgate capability on a more frequent basis, i.e., hourly, once per hour; daily, once per day; and, monthly, once per week. A transmission service provider's obligations under Requirement R10 should not require transmission operators to update transmission models any more frequently than required in sub-requirements R3.2 and R3.3.

c. MOD–030–2, Existing Transmission Commitments, Requirement R6

NOPR Proposal

254. In the NOPR, the Commission proposed to approve MOD–030–2, including Requirement R6, which sets variables to use in calculating the impact of existing transmission commitments for firm commitments. These variables include: The impact of all firm network integration transmission service including native load and network service load, the impact of all confirmed firm point-to-point transmission service expected to be scheduled including roll-over rights, the impact of any grandfathered firm obligation expected to be scheduled, the impact of other firm services determined by the transmission service provider. Requirement R7 requires the transmission service provider to consider similar variables when calculating the impact of existing transmission commitments for non-firm commitments.

Comments

255. Cottonwood states that, during the stakeholder process, it informed NERC that the existing transmission commitment calculation procedures in Requirement R6 were insufficiently detailed, and particularly failed to ensure that transmission service providers do not overstate the capacity set aside for existing transmission commitment purposes. Although NERC responded that the responsible Reliability Standard drafting team has required the use of dispatch modeling information to determine these impacts, Cottonwood states NERC also clarified that the processes used to calculate existing transmission commitments should be included in the available transfer capability implementation documents. Cottonwood expresses concern that the NERC standards drafting team did not adequately address its concerns.

256. Cottonwood contends that overstatement of existing transmission commitments is a serious problem for transmission customers because it understates the available transfer capability/available flowgate capability identified in the models, even though the system could actually carry additional service. Cottonwood further contends that overstatement of existing transmission commitments also can lead to the appearance of phantom congestion and base case overloads in the models, which effectively means that the existing transmission commitment impacts on certain flowgates is greater than the flowgates' capacity, and, thus, these flowgates are overloaded in the available transfer capability power flow models, and access to the transmission system is reduced. To address these concerns, Cottonwood asks the Commission to direct the ERO to modify MOD–030–2 to include requirements that ensure that the generation dispatch model incorporates the way generating units actually are dispatched in daily operation, and any and all operating procedures used to maintain flows within limits. Cottonwood further suggests that impacts from neighboring systems should be taken into account and properly modeled.

257. Entegra contends that NERC's proposal does not comply with the Commission's directives in Order Nos. 693 and 890. Entegra states that the proposed existing transmission commitments calculation is loose and unclear and the proposed requirements do not prevent transmission service providers from overstating the flowgate capacity set aside for existing transmission purposes, which leads to base case contingency overloads. Accordingly, Entegra asks the Commission to direct the ERO to modify the Reliability Standard to require transmission providers to use an accurate and realistic dispatch model and to benchmark existing transmission commitment calculations against real-time flows to ensure that these values are not being overstated. In addition, Entegra contends that transmission service providers should be required to identify and report to NERC, on a periodic basis, all base case congestion overloads over five percent and chronic base case congestion overloads for further investigation and action.

Commission Determination

258. In Order No. 890, the Commission determined that existing transmission commitments should be defined to include committed uses of the transmission system, including: (1) Native load commitments (including network service); (2) grandfathered transmission rights; (3) appropriate point-to-point reservations; (4) rollover rights associated with long-term firm service; and (5) other uses identified through the NERC process.[119] Further, the Commission decided that existing transmission commitments should not be used to set aside transfer capability for any type of planning or contingency reserve, which are instead addressed through capacity benefit margin and transfer reliability margin calculations.[120] We find that, as written, the ERO's definition of existing transmission capacity satisfies the Commission's directions in Order No. 890.

259. Under Requirements R6 and R7 of MOD–030–2, a transmission provider must sum the impact of certain defined transmission commitments as well as other firm and non-firm services determined by the TSP. Relevant impact is undefined as are ''other'' firm and non-firm services. Thus, there is potential for a transmission service provider to overstate or understate existing transmission commitments. However, this concern is mitigated by fact that, under MOD–001–1 Requirement R2, transmission service providers must recalculate available transfer capability or available flowgate capability (which include existing transmission commitments) for specific time periods. Entities are also required to make their assumptions available. In addition, in measures M13 and M14 of MOD–030–2, NERC states that a recalculated existing transmission commitment value that is within 15 percent or 15 MW, whichever is greater, of the originally calculated values, is evidence that the transmission service provider used the requirements defined in R6 and R7. We therefore decline to direct the modifications proposed.

d. MOD–030–2, Power Transfer and Outage Transfer Distribution Factors

NOPR Proposal

260. Requirement R2 of MOD–030–2 provides that, in determining which flowgates to use in the available flowgate capability process the transmission operator must use, at a minimum, certain criteria as enumerated in the sub-requirements. Requirement R2.1.1 requires transmission operators to consider the results of a first contingency transfer analysis from all adjacent balancing authority source and sink combinations up to the path capability such that at a minimum the first three limiting elements and their worst associated contingency combinations with an outage transfer distribution factor of at least 5 percent and within the transmission operator's system are included in the flowgates unless the interface between such adjacent balancing authorities is accounted for using another available transfer capability. Requirement R2.1.4 requires transmission operators to consider any limiting element or contingency where the coordination of the limiting

[119] Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 244.

[120] *Id.*

element/contingency combination is not addressed through a different methodology, and, among other things, any generator within the transmission service provider's area has at least a 5 percent power distribution factor or outage transfer distribution factor impact on the flowgate when delivered to the aggregate load of its own area.

Comments

261. Entegra states that NERC's proposal gives transmission operators the discretion to use arbitrarily small distribution factors, without requiring any justification or explanation as to why the chosen value is appropriate. Entegra also states that the use of lower distribution factors may affect reliability insofar as it conflicts with other Reliability Standards, e.g., the transmission loading relief procedure, that uses a five percent distribution factor. Accordingly, Entegra asks the Commission to direct the ERO to modify the Reliability Standard to set a five percent default value for both the power transfer and outage transfer distribution factors. Entegra states that the revised Reliability Standard should require transmission operators to justify their choice of distribution factors if less than five percent. In addition, Entegra states that NERC should require transmission operators using a lower value to develop appropriate procedures to address any conflicts between the distribution factor values chosen for available transfer capability purposes and those used for other purposes, such as the transmission loading relief procedure.

Commission Determination

262. In the NOPR, the Commission stated that it is appropriate for transmission service providers to retain some level of discretion in the calculation of available transfer capability or available flowgate capability. Requiring absolute uniformity in criteria and assumptions across all transmission service providers would preclude transmission service providers from calculating available transfer capability or available flowgate capability in a way that accommodates the operation of their particular systems. Similarly, the Commission believes that it is appropriate for transmission operators to retain some discretion. Accordingly, the Commission will not direct the ERO to set a specific default value for both the power transfer and outage transfer distribution factors. Moreover, transmission service providers are required to include in their available flowgate capability implementation documents the criteria used by the transmission operator to identify sets of transmission facilities as flowgates that are to be considered in the available flowgate capability calculations. Thus, we are satisfied by the transparency achieved in the Reliability Standard as written.

e. MOD–030–2, Treatment of Adjacent Systems

NOPR Proposal

263. In the NOPR, the Commission proposed to approve MOD–030–2 including sub-requirements R3.5, R5.2 and R5.3. Sub-requirement R3.5 requires transmission operators to make available to the transmission service provider a transmission model to determine available flowgate capability that meets and contains modeling data and system topology (or equivalent representation) for immediately adjacent and beyond reliability coordination areas. When calculation available flowgate capabilities, sub-requirement R5.2 requires transmission service providers to include in the transmission model expected generation and transmission outages, additions, and retirements within the scope of the model as specified in the implementation document and in effect during the applicable period of the calculation for the transmission service provider's area, all adjacent transmission service providers, and any transmission service providers with which coordination agreements have been executed. In addition, under sub-requirement R5.3, transmission service providers must, for external flowgates, use the available flowgate capability provided by the transmission service provider that calculates available flowgate capability for that flowgate.

Comments

264. Entegra states that the proposed requirements for MOD–030–2, specifically sub-requirements R3.5, R5.2, and R5.3, do not require a transmission service provider to represent adjacent systems in a realistic manner or to update its representations of adjacent systems at the same frequency as the transmission service provider's models of its own system. Entegra states that the requirements also do not have a measure to assess the validity of a transmission service provider's representation of adjacent systems. Accordingly, Entegra asks the Commission to direct the ERO to modify MOD–030–2 to require transmission service providers to exchange all model data (e.g., load, generation profile, net interchange, transactions, outages, and discrete transmission and generation elements) necessary to provide an accurate representation of adjacent systems and that transmission service providers update the model data with the same frequency that the transmission service provider updates models of its own system. Entegra also suggests that the revised Reliability Standard should require transmission service providers to benchmark and update their representations of adjacent systems on an on-going basis.

Commission Determination

265. All modeling data used by a transmission service provider to represent conditions of adjacent systems should reflect actual system operations and the models developed should be based on sound engineering principles. The Commission finds that the exchange of data provided under these Reliability Standards should provide transmission service providers with sufficient data to make realistic estimations of available flowgate capability on adjacent systems. Under Requirement R9 of MOD–001–1, a transmission service provider must respond to requests for data even when they are made more frequently than the transmission service provider updates its available transfer or flowgate capability models. Thus, transmission service providers should have access to the most current data available for adjacent systems. In light of these existing requirements, we deny Entegra's request to direct the ERO to modify the standard to require transmission service providers to update their representations of adjacent systems on an on-going basis.

266. Pursuant to the modifications to MOD–001–1 directed above, transmission service providers will be required to benchmark and update their available transfer or flowgate capability calculations. This benchmarked data should provide a sufficient basis to determine whether transmission service providers are modeling adjacent systems in a realistic manner. The Commission will address concerns of unrealistic modeling of adjacent systems on a case-by-case basis if, for example, the matter is raised in a complaint before the Commission. Thus, the Commission declines to direct the modification proposed here.

f. MOD–030–2, Effective Date

Comment

267. Entergy supports NERC's implementation plan with respect to MOD–030–2, which would require compliance one calendar year after approval of MOD–030–2 and its related three standards (MOD–001–1, MOD–

028–1, and MOD–029–1) by all appropriate regulatory authorities. Because MOD–030–2 requires information from neighboring reliability entities for use in the development of its available transfer capability and available flowgate capability values and some of that information may not be available until MOD–028–1 and MOD–29–1 become effective, Entergy agrees with NERC that it is essential that all three methodologies and MOD–001–1 become effective at the same time.

268. Entergy also asks clarification regarding the stated effective date. Entergy contends that defining the effective date of MOD–030–2 with reference to a detail in an earlier version of the Reliability Standard that is proposed to be superseded creates a lack of clarity. Accordingly, Entergy recommends that NERC revise MOD–030–2 to incorporate the same effective date language used in MOD–001–1, MOD–028–1, and MOD–029–1.

Commission Determination

269. As noted above, the Commission approves the proposal to make these Reliability Standards effective on the first day of the first calendar quarter that is twelve months beyond the date that the Reliability Standards are approved by all applicable regulatory authorities. Although MOD–030–2 defines its effective date with reference to the effective date of MOD–030–1, the Commission finds that this direction is sufficiently clear in the context of the current proceeding. To the extent necessary, we clarify MOD–030–2 shall become effective on the first day of the first calendar quarter that is twelve months beyond the date that the Reliability Standards are approved by all applicable regulatory authorities. The Commission also directs the ERO to make explicit such detail in any future version of this or any other Reliability Standard.

C. Violation Risk Factors and Violation Severity Levels

NOPR Proposal

270. The Commission proposed to accept NERC's commitment to file violation severity levels and violation risk factors at a later time. The Commission noted that the Violation Severity Level Order was issued after NERC developed the violation severity level assignments for the Reliability Standards at issue in this proceeding.[121] The Commission acknowledged that, as a result, NERC was unable to evaluate and modify the proposed violation severity levels to comply with the Commission's guidelines prior to filing the proposed Reliability Standards. The Commission therefore proposed to direct the ERO to reevaluate the violation severity levels associated with all of the proposed Reliability Standards based on the Commission's guidelines outlined in the Violation Severity Level Order and prepare appropriate revisions. In addition, the Commission proposed to accept NERC's proposal to allow NERC staff to review the violation risk factors through an open stakeholder process to ensure that they are consistent with the intent of the violation risk factor definition and guidance provided in the Violation Risk Factor Order and the Violation Risk Factor Rehearing Order.[122] The Commission proposed to direct NERC to file revised violation severity levels and violation risk factors no later than 120 days before the Reliability Standards become effective.

Comments

271. Puget Sound states that it supports the Commission's proposal that NERC not file violation risk factors and violation severity levels at this time. Puget Sound also states that it supports the Commission's proposal to allow NERC staff time to review the violation risk factors through an open stakeholder process to ensure that they are consistent with Commission precedent. Puget Sound also contends that no requirement of the proposed MOD Reliability Standards should be assigned a violation risk factor exceeding ''Lower'' because the potential violations of these standards would not directly affect the electrical state or the capability of the Bulk-Power System, or the ability to effectively monitor and control the Bulk-Power System.[123] For the same reason, Puget Sound also contends that the MOD Reliability Standards should not be assigned violation severity levels greater than ''Lower.''

272. The Joint Municipals also argue that the Commission should direct NERC to assign low violation risk factors to the Reliability Standards approved here. The Joint Municipals point out, as the Commission did in the NOPR, that the NERC Reliability Standards drafting team adjusted the violation risk factors to ''lower'' from ''medium,'' in view of what appears to be the consensus that the available transfer capability-related Reliability Standards are not critical to system reliability.

273. By contrast, Midwest ISO contends that the original set of violation risk factors assigned by the Reliability Standard drafting team and submitted to industry vote are valid. Midwest ISO states that the violation risk factors already have been through an open stakeholder process in which the proposed Reliability Standards were commented on and voted upon multiple times. Further, Midwest ISO contends that continued delay in filing the violation risk factors contravenes NERC's earlier commitment to file in a timely manner.

Commission Determination

274. The Commission adopts the NOPR proposal and directs the ERO to reevaluate the violation risk factors and violation severity levels associated with all of the proposed MOD Reliability Standards based on the Commission's precedent and to prepare appropriate revisions. The Commission notes that in Order No. 722, the Commission encouraged the ERO to develop a new and comprehensive approach that would better facilitate the assignment of violation severity levels and violation risk factors both prospectively and to approved Reliability Standards.[124] NERC responded by making an informational filing proposing a new method for assigning violation risk factors and violation severity levels. Although the Commission reserves judgment of the merits of the ERO's proposals presented in the informational filing, the Commission accepts the ERO's commitment to reevaluate the violation risk factors and violation severity levels associated with these MOD Reliability Standards through an open stakeholder process to ensure that they are consistent with the intent of violation risk factor definitions and Commission precedent. The Commission hereby directs the ERO to file revised violation severity levels and violation risk factors no later than 120 days before the Reliability Standards become effective. In light of this reevaluation of the violation severity levels and violation risk factors, we find the arguments raised by Puget Sound and the Joint Municipals to be premature.

[121] NOPR, FERC Stats. & Regs. ¶ 32,641 at P 123, *citing North American Electric Reliability Corp.,* 123 FERC ¶ 61,284, at P 20–35 (2008) (Violation Severity Level Order).

[122] *North American Electric Reliability Corp.,* 119 FERC ¶ 61,145, at P 9 (Violation Risk Factor Order), *order on reh'g,* 120 FERC ¶ 61,145 (2007).

[123] *Citing* Violation Risk Factor Order, 119 FERC ¶ 61,145 at P 9.

[124] *Version Two Facilities Design, Connections and Maintenance Reliability Standards,* Order No. 722, 126 FERC ¶ 61,255, at P 45 (2009).

D. Disposition of Other Reliability Standards

1. MOD–010–1 through MOD–025–1

NOPR Proposal

275. In the NOPR, the Commission proposed to allow NERC to address revisions to MOD–010 through MOD–025 to incorporate a requirement for periodic review and modification of models for (1) load flow base cases with contingency, subsystem, and monitoring files, (2) short circuit data, and (3) transient and dynamic stability simulation data, in order to ensure that they are up to date. These Reliability Standards are generally intended to establish consistent data requirements, reporting procedures and system models for use in reliability analysis. As such, the Commission proposed to find that NERC is correct that these Reliability Standards were not a part of the available transfer capability modifications required in Order Nos. 890 and 693.

Commission Determination

276. The Commission hereby adopts its NOPR proposal and will allow NERC to address revisions to MOD–010 through MOD–025 through a separate project. In Order No. 693, the Commission identified nine Reliability Standards as the core of the available transfer capability initiative directed in Order No. 890.[125] None of the Reliability Standards MOD–010 through MOD–025 were identified as part of that initiative.

2. Reliability Standards To Be Retired or Withdrawn

NOPR Proposal

277. In the NOPR, the Commission proposed to approve NERC's request to retire MOD–006–0 and MOD–007–0 and to withdraw its request for approval of MOD–001–0, MOD–002–0, MOD–003–0, MOD–004–0, MOD–005–0, MOD–008–0, and MOD–009–0. The Commission also proposed to find that MOD–001–0, MOD–002–0, MOD–003–0, MOD–004–0, MOD–005–0, MOD–008–0, and MOD–009–0 are all superseded by the available transfer capability calculations required by the proposed MOD Reliability Standards in this proceeding are, upon the effectiveness of the proposed MOD Reliability Standards, no longer necessary.

278. The Commission also proposed to not grant NERC's request to withdraw FAC–012–1, nor approve the retirement of FAC–013–1.[126] With respect to these two Reliability Standards, the Commission disagreed with NERC that they are wholly superseded by the MOD Reliability Standards addressed in these proceeding. The Commission noted that, under FAC–012–1, reliability coordinators and planning authorities would be required to document the methodology used to establish inter-regional and intra-regional transfer capabilities and to state whether the methodology is applicable to the planning horizon or the operating horizon. The Commission also noted that, under FAC–013–1, reliability coordinators and planning authorities are required to establish a set of inter-regional and intra-regional transfer capabilities that are consistent with the methodology documented under FAC–012–1, which could require the calculation of transfer capabilities for both the planning horizon and the operating horizon. The Commission posited that these FAC Reliability Standards were necessary because the proposed MOD Reliability Standards provide only for the calculation of available transfer capability and its components, including total transfer capability, in the operating horizon.[127] Thus, the Commission stated, the proposed MOD Reliability Standards do not govern the calculation of transfer capabilities in the planning horizon, i.e., beyond 13 months in the future.

279. In Order No. 693, the Commission approved FAC–013–1, but declined to approve or remand FAC–012–1. The Commission expressed concern that FAC–012–1 merely required the documentation of a transfer capability methodology without providing a framework for that methodology including data inputs and modeling assumptions.[128] The Commission also expressed concern that the criteria used to calculate transfer capabilities for use in determining available transfer capability must be identical to those used in planning and operating the system.[129] The Commission directed the ERO to modify FAC–012–1 to provide a framework for the transfer capability calculation methodology that takes account of the need for consistency in the criteria used to calculate transfer capabilities.[130]

Comments

280. NERC does not object to the Commission proposal to retain FAC–012–1 and FAC–013–1 but asks the Commission for additional time to make the appropriate revisions. Instead of directing NERC to file the proposed modifications within 120 days prior to the effective date of the available transfer capability-related MOD Reliability Standards, NERC proposes that the Commission instead require that these changes be filed 60 days before the Reliability Standards become effective. NERC states that this will provide it with additional time to develop these changes in accordance with the Reliability Standards development process, and minimize the probability that special exceptions to the process be granted in order to meet the Commission's proposed deadline. In addition, NERC states that this delay will help ensure that these changes do not take undue precedence ahead of other issues currently prioritizes and being addressed in the NERC standards development work plan.

281. EEI, Duke, First Energy, FPL and Puget Sound object to the Commission's proposal to retain FAC–012–1 and FAC–013–1. EEI states that although the NOPR defined the operating horizon to include the next twelve months (i.e., months 2–13), Order No. 890 defined the operating horizon as ''day-ahead and pre-schedule'' and the planning horizon as ''beyond the operating horizon.''[131] Thus, EEI argues that the proposed MOD Reliability Standards provide for the calculation of available transfer capability during part of the planning of horizon even though they do not address the calculation of available transfer capability beyond month 13.

282. EEI further contends that there is no reliability concern created by retiring FAC–012–1 and FAC–013–1 just as there are no reliability benefits obtained by complying with them. EEI contends that this is particularly true in the Eastern Interconnection where the Eastern Interconnection Reliability Assessment Group exists as a forum for organizing reliability-related modeling and planning activities by defining various studies and cases, as well as common assumptions, for the long-term planning horizon. Thus, EEI contends, the Commission should not view the retiring of FAC–012–1 and FAC–013–1 as creating a vacuum; rather, the proposed MOD Reliability Standards have ''wholly superseded'' them by replacing their only useful components.

[125] Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 206.

[126] NOPR, FERC Stats. & Regs. ¶ 32,641 at P 138.

[127] *See* MOD–001–1, Requirement R2.3.

[128] Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 777.

[129] *Id.* P 782.

[130] *Id.* P 779, 782.

[131] *Citing* Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 323 and Attachment C.

In the alternative, if the Commission decides to retain FAC–012–1, EEI suggests that the Commission direct NERC to consider moving the substantive content of FAC–012–1 into a technical guidance document and have the document appended to an approved FAC Reliability Standard.

283. Duke states that it supports NERC's proposal to retire FAC–013–1 when the MOD Reliability Standards become effective and to withdraw its request for approval of FAC–012–1. Duke states that it does not believe that available transfer capability calculations made past a 13 month period are sufficient to support reliable long-term transmission service and so supports EEI's comments related to calculations made past month 13. Duke also contends that, in the Eastern Interconnect region, regional assessments and planning are occurring for transfer capabilities in the planning horizon (i.e., period of time after 13 months) in various forums such as Southeastern Electric Reliability Council's long-term study group and the Eastern Interconnection Reliability Assessment Group. Duke states that other efforts exist in response to Order No. 890's regional planning requirements such as the Southeast Inter-Regional Participation Process and the North Carolina Transmission Planning Collaborative. Duke contends that these and other regional planning efforts will effectively ensure that levels of transfer capability are maintained to meet regional and interconnection wide reliability requirements in the planning horizon.

284. If the Commission adopts FAC–012–1 and retains FAC–013–1, then Duke requests that the Commission require FAC–012–1 to be revised to focus on the development of a methodology for calculation inter-regional and intra-regional transfer capabilities for use in assessing the ability of the Bulk-Power System to support potentially large, diverse regional transfers of power in a reliable manner, rather than calculation of total transfer capabilities or available transfer capabilities for evaluation of service requests. Duke contends that there is no Commission requirement for the posting of total transfer capabilities and/or available transfer capabilities beyond 13 months. Further, if the Commission approves FAC–012–1, Duke requests that it be made applicable to just the planning coordinator, and not the reliability coordinator, since the Reliability Standard would focus on the planning timeframe. Similarly, Duke recommends that the Commission direct the ERO to modify FAC–013–1 to establish and communicate the transfer capabilities developed using the methodology specified in FAC–012–1.

285. FirstEnergy agrees that the MOD–001–1 addresses the scheduling, operating and planning horizons, as those terms were described in Order No. 693.[132] However, if the Commission chooses to direct the ERO to retain FAC–012–1 and FAC–013–1, FirstEnergy asks the Commission to limit the FAC standards to the use of transmission capability for transmission planning and remove redundant provisions for the calculation of transfer capability addressed elsewhere in the MOD Reliability Standards, especially for other purposes such as the calculation of available transfer capability. FirstEnergy states that the FAC and the MOD Reliability Standards each address the calculation of transfer capability in the operational time-period. To eliminate this redundancy, FirstEnergy suggests that the Commission direct the ERO to assign the treatment of operational transfer capability to the MOD Reliability Standards and eliminate the reference to the use of transfer capability in the operational horizon in the operational standards. FirstEnergy further contends that the FAC Reliability Standards are ambiguous since they require the calculation of a parameter, transfer capability in the planning horizon, for which the purpose is not described or specified. Nevertheless, FirstEnergy states that it strongly supports the standard drafting team's conclusion that the best method for addressing total transfer capability accurately and clearly is within the MOD Reliability Standards.

286. FPL contends that the elimination of FAC–012–1 and FAC–013–1 would not create a void. FPL states that the total transfer capability and available transfer capability in the long-term planning horizon are not tied to a specific path for posting purposes, but instead look at the transmission network limits for which expansion projects would be initiated to meet the long-term needs for firm transmission service. Although the MOD Reliability Standards do not require the posting of transfer capabilities beyond 13 months, FPL states that this is only a minimum requirement that reflects the impractical nature of pre-determined transfer capability calculations for the planning horizon after the 13th month. FPL contends that the study of transmission service requests beyond the 13th month of the planning horizon requires specific knowledge and assumptions, and such requests could not be granted based on pre-determined calculations alone. For these reasons FPL agrees with NERC's recommendation to withdraw Reliability Standard FAC–012–1 and retire FAC–013–1.

287. Pacific Northwest contends that MOD–003–0 should not be retired or withdrawn. Pacific Northwest states that MOD–030–2 requires regional reliability organizations to develop and document procedures that allow transmission service customers to inquire about calculations of total transfer capability and available transfer capability, timeframes for response and posting requirements applicable to the regional reliability organization. Pacific Northwest contends that this procedure fills gaps in the current NAESB business practice in that the procedure facilitates the provision of information about available transfer capability and total transfer capability calculations for transmission paths with multiple owners but with one available transfer capability rating and one seasonal operating transfer capability rating.

Commission Determination

288. The Commission hereby adopts the NOPR proposal and approves NERC's request to retire MOD–006–0 and MOD–007–0 and to withdraw its request for approval of MOD–001–0, MOD–002–0, MOD–003–0, MOD–004–0, MOD–005–0, MOD–008–0, and MOD–009–0. The Commission also finds that MOD–001–0, MOD–002–0, MOD–003–0, MOD–004–0, MOD–005–0, MOD–008–0, and MOD–009–0 are all superseded by the available transfer capability calculations required by the proposed MOD Reliability Standards in this proceeding are, upon the effectiveness of the proposed MOD Reliability Standards, no longer necessary.

289. Consistent with its NOPR proposal, the Commission finds that NERC has not addressed the requirements of Order No. 693 with regard to the calculation of transfer capabilities in the planning horizon. In Order No. 693 the Commission expressed concern that the criteria used to calculate transfer capabilities for use in determining available transfer capability must be identical to those used in planning and operating the system.[133] As EEI observes, in Order No. 890, the Commission offered, as an example, a possible definition of the operating horizon as the day-ahead and pre-scheduling periods and the

[132] Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 1047.

[133] Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 782.

planning horizon as anything beyond the operating horizon.[134] However, NERC has already defined the near-term planning horizon as years one through five in sub-requirement R1.2 of TPL–005. The Commission believes that this definition should be consistent throughout the Reliability Standards.

290. The Commission recognizes that the calculation of transfer capabilities in the planning horizon (years one through five) may not be so accurate to support long-term scheduling of the transmission system but we do believe that such forecasts will be useful for long-term planning, in general, by measuring sufficient long-term capacity needed to ensure the reliable operation of the Bulk-Power System. Although regional planning authorities have developed similar efforts in response to Order No. 890, we believe that the requirements imposed by FAC–012 and FAC–013 need not be duplicative of those existing efforts and, by contrast, should be focused on improving the long-term reliability of the Bulk-Power System pursuant to the ERO's Reliability Standards. We believe that these responsibilities would be appropriately assigned to the planning coordinator and not the reliability coordinator.

291. The Commission hereby adopts its NOPR proposal to deny NERC's request to withdraw FAC–012–1 and retire FAC–013–1. Instead, pursuant to section 215(d)(5) of the FPA and section 39.5(f) of our regulations, the Commission directs the ERO to develop modifications to FAC–012–1 and FAC–013–1 to comply with the relevant directives of Order No. 693 [135] and, as otherwise necessary, to make the requirements of those Reliability Standards consistent with those of the MOD Reliability Standards approved herein as well as this Final Rule. These modifications should also remove redundant provisions for the calculation of transfer capability addressed elsewhere in the MOD Reliability Standards. In making these revisions, the ERO should consider the development of a methodology for calculation of inter-regional and intra-regional transfer capabilities. The Commission accepts the ERO's request for additional time to prepare the modifications and so directs the ERO to submit the modifications to FAC–012–1 and FAC–013–1 no later than 60 days before the MOD Reliability Standards become effective.

E. Applicability

Comments

292. Supported by Austin, ERCOT requests that the Commission act to ensure the proposed Reliability Standards are not applied to the ERCOT region. ERCOT contends that the proposed Reliability Standards have no value in the ERCOT region because ERCOT does not have a transmission market and it manages congestion by employing a security constrained economic dispatch. ERCOT further contends that the proposed MOD Reliability Standards are actually counter-productive to the efficient operation of the ERCOT grid and markets. ERCOT states that there are two primary concerns associated with available transfer capability, underutilization and oversubscription of the grid. ERCOT contends that these concerns only apply in regions that have transmission markets, and primarily physical markets, where the available transfer capability calculation can actually be performed because there are transmission obligations that can be netted against total transfer capability. ERCOT further contends that neither concern arises in the ERCOT region because there is no transmission market.

293. Similarly, ERCOT contends that capacity benefit margin has no relevance in ERCOT because there is no transmission market and all energy schedules are respected inside ERCOT without the need for transmission reservations. ERCOT further argues that requiring ERCOT to set aside transmission capacity to meet the proposed capacity benefit margin obligation would actually be counter-productive because it would inhibit efficient dispatch of the system, thereby creating artificial congestion to respect the reserved capacity benefit margin. ERCOT also contends that transfer reliability margin is irrelevant in the ERCOT region because ERCOT manages all operational issues through re-dispatch. Furthermore, because available transfer capability is undefined in the ERCOT region, ERCOT argues that the Reliability Standards establishing the calculation methodologies are also irrelevant with the region.

294. NYISO asks the Commission to clarify that the MOD Reliability Standards should be interpreted with a reasonable degree of flexibility to accommodate the special characteristics of ISOs and RTOs. NYISO contends that the MOD Reliability Standards were written to accommodate physical reservation transmission systems and do not include provisions that accommodate the special characteristics of NYISO's financial reservation model. NYISO states that it has reached an informal agreement with NERC through which NYISO believes it could comply with the requirements of MOD–029–1 as written. NYISO also asks the Commission to indicate that it will entertain a future NYISO request for confirmation that it is in compliance with the NERC Reliability Standards. NYISO further asks the Commission to clarify that it expects NERC and the regional entities to accommodate financial transmission rights based open access market designs when evaluating the compliance of the NYISO, and to the extent relevant, other ISOs and RTOs, with the proposed MOD Reliability Standards.

295. Entergy requests clarification whether entities that use a value of zero for transfer reliability margin and capacity benefit margin are technically maintaining transfer reliability margin or capacity benefit margin and, if not, whether MOD–004–1 and MOD–008–1 apply to those entities. Entergy contends that if the transfer reliability margin and capacity benefit margin Reliability Standards do apply to entities that maintain a value of zero, the Reliability Standards should only require that the transmission reserve margin and capacity benefit margin implementation documents state that no capacity benefit margin or transfer reliability margin set-aside exists. In addition, Entergy requests clarification whether MOD–008–1 applies to entities that only use transfer reliability margin in system impact studies when evaluating long-term firm transmission service requests and whether such entities would be required to maintain a transfer reliability margin implementation document.

Commission Determination

296. In Order No. 693, the Commission found that a Reliability Standard must provide for the Reliable Operation of the Bulk-Power System facilities and may impose a requirement on any user, owner or operator of such facilities.[136] The Commission went on to say that a Reliability Standard should be a single standard that applies across the North American Bulk-Power System to the maximum extent this is achievable taking into account physical differences in grid characteristics and regional Reliability Standards that result

[134] Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 323.

[135] Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 779, 782.

[136] Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 5.

in more stringent practices.[137] A Reliability Standard can also account for regional variations in the organizational and corporate structures of transmission owners and operators, variations in generation fuel type and ownership patterns, and regional variations in market design if these affect the proposed Reliability Standard. In addition, a Reliability Standard should have no undue negative effect on competition. Following these principles, the Commission finds that the applicability of these Reliability Standards should take into consideration regional differences such as those highlighted by commenters.

297. With respect to the enforcement of these Reliability Standards, the Commission finds that their requirements are sufficiently clear so that an entity should be aware of what it must do to comply.[138] The Commission believes that an entity is able to comply with these Reliability Standards even if there are physical differences in grid characteristics or variations in market design that create challenges. To the extent that a transmission provider, an ISO or RTO has a concern regarding the enforcement of these Reliability Standards, the Commission believes that this is a compliance issue best addressed on a case-by-case basis in the context of a compliance proceeding. For this same reason, the Commission declines to offer its opinion as to whether NYISO is in compliance with the Reliability Standards. As the ERO for North America, NERC is uniquely qualified to enforce its own Reliability Standards.

298. In response to Entergy's comment, the Commission notes that MOD–008–1 is applicable only to transmission operators that maintain transmission reliability margin. Although MOD–004–1 is not as explicit with regard to its applicability, we believe that its applicability is implicitly reserved to those entities that maintain capacity benefit margin. Thus, it does not appear that Entergy, or any other entity, would be in violation of MOD–004–1 or MOD–008–1 if it does not maintain transmission reliability margin or capacity benefit margin. Similarly, in response to ERCOT, we believe that it is appropriate to exempt entities within ERCOT from complying with these Reliability Standards. We agree that, due to physical differences of ERCOT's transmission system, the MOD Reliability Standards approved herein would not provide any reliability benefit within ERCOT.

F. Definitions

NOPR Proposal

299. NERC proposed to modify its Glossary of Terms to add twenty definitions that are used in the five proposed Reliability Standards, including the following definitions of ''ATC Path'', ''Business Practices'', and ''Postback'':

ATC Path: Any combination of Point of Receipt (POR) and Point of Delivery (POD) for which Available Transfer Capability (ATC) is calculated; and any Posted Path.[139]

Business Practices: Those business rules contained in the Transmission Service Provider's applicable tariff, rules, or procedures; associated Regional Reliability Organization or Regional Entity business practices; or North American Energy Standards Board (NAESB) Business Practices.

Postback: Positive adjustments to Available Transfer Capability (ATC) or Available Flowgate Capability (AFC) as defined in Business Practices. Such Business Practices may include processing of redirects and unscheduled service.

300. In the NOPR, the Commission proposed to approve the addition of these terms to the NERC Glossary. The Commission also proposed to direct NERC to modify the definition of Postback to eliminate its reference to Business Practices, another defined term. The Commission observed that the definition of Business Practices includes a reference to the ''regional reliability organization.'' The Commission stated that, in Order No. 693, the Commission directed NERC to eliminate references to regional reliability organizations as responsible entities in the Reliability Standards because such entities are not users, owners or operators of the Bulk-Power System. Accordingly the Commission proposed to direct NERC to remove from the proposed definition of Business Practices, the reference to regional reliability organizations and replace it with the term Regional Entity. The Commission noted, however, that Regional Entity is not currently defined in the NERC Glossary. The Commission therefore proposed to direct NERC to develop a definition of Regional Entity consistent with section 215(a) of the FPA [140] and 18 CFR 39.1 (2008), to be included in the NERC Glossary.

Comments

301. Puget Sound states that it agrees with the Commission that the term ''Postback'' is not fully determinative and requests that the Commission reject the definition as redundant and unnecessary. Puget Sound states that for a particular point of receipt/point of delivery combination, the existing transmission capacity component includes confirmed reservations utilized on that particular point of receipt/point of delivery combination. Puget Sound states that processing firm redirects or annulments to the confirmed reservation reduces the existing commitment component, which in turn increases the resultant available transfer capability, achieving the same result as the desired effect of the Postback term. Puget Sound further contends that requiring a Postback component assumes that once a reservation is confirmed on a particular point of reservation/point of receipt combination the impact of the confirmed reservation will always be present in the available transfer capability calculation, regardless of future redirects, annulments, or recalls that are processed. Puget Sound contends that accepting the Postback definition would add an unnecessary component to the available transfer capability formula, increasing the recordkeeping and documentation burden for applicable entities.

302. SMUD and Salt River ask the Commission to clarify that the proposed definition of ''ATC Path'' does not limit a transmission provider's flexibility to treat multiple parallel interconnections between balancing authorities as a single path. NERC proposes to define ''ATC Path'' as: ''Any combination of Point of Receipt and Point of Delivery for which [available transfer capability] is calculated; and any Posted Path.'' SMUD and Salt River note that this definition references the definition of ''Posted Path'' in the Commission's regulations, 18 CFR § 37.6(b)(1), which defines ''Posted Path'' as any control area to control area interconnection and any path for which a customer requests to have available transfer capability and total transfer capability posted. They contend that one possible way to interpret ''control area to control area interconnection'' would be to treat each physical interconnection between Balancing Authorities as creating a separate available transfer capability path. They argue that the Commission should clarify the definition so as to recognize that available transfer capability paths may or should be comprised of multiple, parallel interconnections between Balancing Authorities as reliability interests determine.

303. SMUD and Salt River also ask the Commission to direct the ERO to modify the definition of ''ATC Path'' to remove reference to the Commission's regulations. They argue that the reference is inappropriate as applied to

[137] *Id.* P 6.

[138] *See id.* P 254.

[139] *See* 18 CFR 37.6(b)(1).

[140] 16 U.S.C. 824o.

them because SMUD and Salt River are not subject to the Commission's regulations. They also contend that confusion could arise if the Commission revises its definition of Posted Path and thereby effectively modifies the Reliability Standards.

Commission Determination

304. The Commission believes that the definition of Postback is not fully determinative. NERC should be able to define this term without reference to the Business Practices, another defined term. Accordingly, the Commission adopts its NOPR proposal and directs the ERO to develop a modification to the definition of Postback to eliminate the reference to Business Practices. Although we are sensitive to Puget Sound's concern that the required Postback component may increase the recordkeeping burden on some entities, in other regions the component may be critical. We disagree that the term's existence assumes that once a reservation is confirmed on a particular point of reservation/point of receipt combination the impact of the confirmed reservation will always be present in the available transfer capability calculation. However, we would consider suggestions that would allow entities to comply with the requirements as efficiently as possible, such as a regional difference through the ERO's standards development procedure.

305. The Commission also adopts its NOPR proposal to direct the ERO to develop a modification to the definition of Business Practices that would remove the reference to regional reliability organizations and replace it with the term Regional Entity. We also direct the ERO to develop a definition of the term Regional Entity to be included in the NERC Glossary.

306. We agree with SMUD and Salt River that the definition of ''ATC Path'' should not limit a transmission provider's flexibility to treat multiple parallel interconnections between balancing authorities as a single path, and that available transfer capability paths may comprise multiple, parallel interconnections between Balancing Authorities when such treatment is appropriate to maintain reliability. We also agree that the definition should not reference the Commission's regulations. The Commission's regulations are not applicable to all registered entities and are subject to change. We therefore direct the ERO to develop a modification to the definition of ''ATC Path'' that does not reference the Commission's regulations.

IV. Information Collection Statement

307. The following collections of information contained in this final rule have been submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the Paperwork Reduction Act of 1995.[141] OMB's regulations require OMB to approve certain information collection requirements imposed by agency rule.[142]

308. The Commission solicited comments on the need for and the purpose of the information contained in these Mandatory Reliability Standards and the corresponding burden to implement them. The Commission did receive comments on specific requirements in the Reliability Standards and how their impact would be burdensome. We have addressed those concerns elsewhere in this Final Rule. However, we did not receive comments on our reporting burden estimates. The Commission has updated the burden requirements to be consistent with our directions in this Final Rule.

Burden Estimate: The public reporting and records retention burdens for the proposed reporting requirements and the records retention requirement are as follows.[143]

Data collection	Number of respondents	Number of responses	Hours per response	Total annual hours
Mandatory data exchanges	137	1	80	10,960
Explanation of change of ATC values	137	1	100	13,700
Recordkeeping	137	1	30	3,480

Total Annual Hours for Collection:

Reporting + recordkeeping hours = 3,480 + 24,660 = 28,140 hours.

Cost to Comply:

Reporting = $2,811,240

24,660 hours @ $114 an hour (average cost of attorney ($200 per hour), consultant ($150), technical ($80), and administrative support ($25))

Recordkeeping = $185,875 (same as below)

Labor (file/record clerk @ $17 an hour) 3,480 hours @ $17/hour = $59,150

Storage 137 respondents @ 8,000 sq. ft. × $925 (off site storage) = $126,725

Total costs = $2,997,115

Labor $ ($2,811,240 + $59,150) + Recordkeeping Storage Costs ($126,725)

309. OMB's regulations require it to approve certain information collection requirements imposed by an agency rule. The Commission is submitting notification of this Final Rule to OMB. If the proposed requirements are adopted they will be mandatory requirements.

Title: Mandatory Reliability Standards for the Calculation of Available Transfer Capability, Capacity Benefit Margins, Transmission Reliability Margins, Total Transfer Capability, and Existing Transmission Commitments and Mandatory Reliability Standards for the Bulk-Power System.

Action: Final Rule.

OMB Control No.: 1902–0244.

Respondents: Business or other for profit.

Frequency of responses: On occasion.

Necessity of the Information:

310. *Internal Review:* The Commission has reviewed the approved reliability standards and made a determination that these requirements are necessary to implement section 215 of the Energy Policy Act of 2005. These requirements conform to the Commission's plan for efficient information collection, communication and management within the energy industry. The Commission has to assure itself, by means of internal review, that there is specific, objective support for the burden estimates associated with the information requirements.

311. Interested persons may obtain information on the reporting requirements by contacting the following: Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426 [Attention: Michael Miller, Office of the Executive

[141] 44 U.S.C. 3507(d).

[142] 5 CFR 1320.11.

[143] These burden estimates apply only to this Final Rule and do not reflect upon all of FERC–516 or FERC–717.

Director, Phone: (202) 502–8415, fax: (202) 273–0873, e-mail: *michael.miller@ferc.gov*.].

312. For submitting comments concerning the collection(s) of information and the associated burden estimate(s), please send your comments to the contact listed above and to the Office of Information and Regulatory Affairs, Office of Information and Regulatory Affairs, Washington, DC 20503 [Attention: Desk Officer for the Federal Energy Regulatory Commission, phone (202) 395–4650, fax: (202) 395–7285, e-mail: *oira_submission@omb.eop.gov*.].

V. Environmental Analysis

313. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect on the human environment.[144] The actions proposed here fall within the categorical exclusion in the Commission's regulations for rules that are clarifying, corrective or procedural, for information gathering, analysis, and dissemination.[145]

VI. Regulatory Flexibility Act

314. The Regulatory Flexibility Act of 1980 (RFA) [146] generally requires a description and analysis of final rules that will have significant economic impact on a substantial number of small entities. The MOD Reliability Standards apply to transmission service providers and transmission operators. Transmission service providers and transmission operators are entities responsible for the reliability of a transmission system. They operate or direct the operations of the transmission facilities or control facilities used for the transmission of electric energy in interstate commerce. Accordingly, these entities do not fall typically within the definition of a small entity.[147]

315. Section 215(d)(2) of the FPA provides that the Commission may approve, by rule or order, a proposed Reliability Standard or modification to a proposed Reliability Standard if it meets the statutory standard for approval, giving due weight to the technical expertise of the ERO. Alternatively, the Commission may remand a Reliability Standard pursuant to section 215(d)(4) of the FPA. Further, the Commission may order the ERO to submit to the Commission a proposed Reliability Standard or a modification to a Reliability Standard that addresses a specific matter if the Commission considers such a new or modified Reliability Standard appropriate to ''carry out'' section 215 of the FPA. The Commission's action in this final rule is based on its authority pursuant to section 215 of the FPA.

316. As indicated above, approximately 137 entities will be responsible for compliance with the three new Reliability Standards. Of these only six, or less than five percent, have output of four million MWh or less per year.[148] The Commission does not consider this a substantial number. Based on this understanding, the Commission certifies that this Final Rule will not have a significant economic impact on a substantial number of small entities. Accordingly, no regulatory flexibility analysis is required.

VII. Document Availability

317. In addition to publishing the full text of this document in the **Federal Register,** the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through FERC's Home Page (*http://www.ferc.gov*) and in FERC's Public Reference Room during normal business hours (8:30 a.m. to 5 p.m. Eastern time) at 888 First Street, NE., Room 2A, Washington, DC 20426.

318. From FERC's Home Page on the Internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

319. User assistance is available for eLibrary and the FERC's Web site during normal business hours from FERC Online Support at 202–502–6652 (toll free at 1–866–208–3676) or e-mail at *ferconlinesupport@ferc.gov,* or the Public Reference Room at (202) 502–8371, TTY (202) 502–8659. E-mail the Public Reference Room at *public.referenceroom@ferc.gov.*

VIII. Effective Date and Congressional Notification

320. These regulations are effective February 8, 2010. The Commission notes that although the determinations made in this Final Rule are effective February 8, 2010, the MOD Reliability Standards approved herein will not become effective until the first day of the first quarter no sooner than one calendar year after approval by all appropriate regulatory authorities where approval is required. The Commission has determined, with the concurrence of the Administrator of the Office of Information and Regulatory Affairs of OMB, that this Rule is not a ''major rule'' as defined in section 351 of the Small Business Regulatory Enforcement Fairness Act of 1996.

By the Commission.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

Appendix A: Commenting Party Acronyms

Abbreviation	Commenter name
APPA	American Public Power Association.
Austin	Austin, City of.
Avista	Avista Corporation.
Bonneville	Bonneville Power Administration.
ColumbiaGrid	ColumbiaGrid.
Cottonwood	Cottonwood Energy Company.
Duke	Duke Energy Carolinas, LLC.
EEI	Edison Electric Institute.
EPSA	Electric Power Supply Corporation.
ERCOT	Electric Reliability Council of Texas, Inc.
Entegra	Entegra Power Group LLC.

[144] *Regulations Implementing the National Environmental Policy Act of 1969,* Order No. 486, 52 FR 47897 (Dec. 17, 1987), FERC Stats. & Regs. ¶ 30,783 (1987).

[145] 18 CFR 380.4(a)(5).

[146] 5 U.S.C. 601–612.

[147] The definition of ''small entity'' under the Regulatory Flexibility Act refers to the definition provided in the Small Business Act, which defines a ''small business concern'' as a business that is independently owned and operated and that is not dominant in its field of operation. *See* 15 U.S.C. 632 (2000).

[148] *Id.*

Abbreviation	Commenter name
Entergy	Entergy Services Inc.
FirstEnergy	FirstEnergy Service Company.
FPL	Florida Power & Light Company.
Georgia	Georgia Transmission Corporation.
ISO/RTO Council	ISO/RTO Council.
ITC Companies	International Transmission Company, Michigan Electric Transmission Company, LLC, and ITC Midwest LLC.
LADWP	Los Angeles Dept. of Water and Power.
MISO	Midwest ISO.
Modesto	Modesto Irrigation District.
Nevada Companies	Nevada Power Company and Sierra Pacific Power Company.
NYISO	New York ISO.
NERC	North American Electric Reliability Corp.
Northwest Utilities	Northwest Requirements Utilities.
Northwestern	Northwestern Corporation.
Pacific Northwest	Pacific Northwest Generating Cooperative.
PacifiCorp	PacifiCorp.
Public Power Council	Public Power Council.
Snohomish	Public Utility District No. 1 of Snohomish County.
Puget Sound	Puget Sound Energy, Inc.
SMUD	Sacramento Municipal Utility District.
Salt River	Salt River Project.
Joint Municipals	South Carolina Public Service Authority, Sacramento Municipal Utility District and MEAG Power.
SWAT	Southwest Area Transmission Sub-Regional Planning Group.
TAPS	Transmission Access Policy Study Group.
TANC	Transmission Agency of Northern California.
Tucson	Tucson Electric Power Company.

[FR Doc. E9–28620 Filed 12–7–09; 8:45 am]

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December 8, 2009

Part IV

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Proposed Revised Critical Habitat for *Brodiaea Filifolia* (Thread-Leaved Brodiaea); Proposed Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[FWS–R8–ES–2009–0073]
[92210–1117–0000–B4]

RIN 1018–AW54

Endangered and Threatened Wildlife and Plants; Proposed Revised Critical Habitat for *Brodiaea filifolia* (thread-leaved brodiaea)

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose to revise designated critical habitat for *Brodiaea filifolia* (thread-leaved brodiaea) under the Endangered Species Act of 1973, as amended (Act). Approximately 3,786 acres (ac) (1,532 hectares (ha)) of habitat fall within the boundaries of the proposed revised critical habitat designation, which is located in Los Angeles, San Bernardino, Riverside, Orange, and San Diego Counties in southern California.

DATES: We will accept comments received or postmarked from all interested parties on or before February 8, 2010. We must receive requests for public hearings, in writing, at the address shown in the **FOR FURTHER INFORMATION CONTACT** section by January 22, 2010.

ADDRESSES: You may submit comments by one of the following methods:

• Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments to Docket No. FWS-R8-ES-2009-0073.

• U.S. mail or hand-delivery: Public Comments Processing, Attn: FWS–R8–ES–2009–0073; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203.

We will not accept e-mail or faxes. We will post all comments on *http://www.regulations.gov*. This generally means that we will post any personal information you provide us (see the **Public Comments** section below for more information).

FOR FURTHER INFORMATION CONTACT: For general information on the proposed designation, contact Jim Bartel, Field Supervisor, U.S. Fish and Wildlife Service, Carlsbad Fish and Wildlife Office, 6010 Hidden Valley Road, Suite 101, Carlsbad, CA 92011; telephone (760) 431–9440; facsimile (760) 431–5901. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at (800) 877–8339.

SUPPLEMENTARY INFORMATION:

Public Comments

We intend that any final action resulting from this proposed rule will be based on the best scientific and commercial data available and be as accurate and as effective as possible. Therefore, we request comments or information from the public, other concerned government agencies, the scientific community, industry, or other interested party concerning this proposed rule. We particularly seek comments concerning:

(1) The reasons why we should or should not revise the designation of habitat as ''critical habitat'' under section 4 of the Endangered Species Act of 1973, as amended (Act; 16 U.S.C. 1531 *et seq.*), including whether there are threats to the species from human activity, the degree of which can be expected to increase due to the designation, and whether that increase in threat outweighs the benefit of designation such that the designation of critical habitat is not prudent.

(2) Specific information on:

• Areas that provide habitat for *Brodiaea filifolia* that we did not discuss in this proposed revised critical habitat rule,

• Areas within the geographical area occupied by the species at the time of listing containing the features essential to the conservation of *B. filifolia* that we should include in the designation and why,

• Areas outside the geographical area occupied by the species at the time of listing that are essential for the conservation of the species and why, and

• Any areas identified in this proposed revised critical habitat rule that should not be proposed as critical habitat and why.

(3) Land-use designations and current or planned activities in the areas proposed as critical habitat, and their possible impacts on proposed critical habitat.

(4) Comments or information that may assist us in identifying or clarifying the primary constituent elements (PCEs).

(5) How the proposed revised critical habitat boundaries could be refined to more closely circumscribe the areas meeting the definition of critical habitat.

(6) Any probable economic, national security, or other relevant impacts of designating any area that may be included in the final designation. We are particularly interested in any impacts on small entities or families, and the benefits of including or excluding areas that exhibit these impacts.

(7) Whether lands in any specific subunits being proposed as critical habitat should be considered for exclusion under section 4(b)(2) of the Act by the Secretary, and whether the benefits of potentially excluding any particular area outweigh the benefits of including that area as critical habitat.

(8) The Secretary's consideration to exercise his discretion under section 4(b)(2) of the Act to exclude lands proposed in Subunits 11a, 11b, 11c, 11d, 11e, 11f, 11g, and 11h that are within the area addressed by the Western Riverside County Multiple Species Habitat Conservation Plan (Western Riverside County MSHCP), and whether such exclusion is appropriate and why.

(9) The Secretary's consideration to exercise his discretion under section 4(b)(2) of the Act to exclude lands proposed in Subunits 4b, 4c, and 4g that are within the area addressed by the Orange County Southern Subregion Habitat Conservation Plan (Orange County Southern Subregion HCP), and whether such exclusion is appropriate and why.

(10) The Secretary's consideration to exercise his discretion under section 4(b)(2) of the Act to exclude lands proposed in Subunits 7a, 7b, 7c, and 7d that are within the area addressed by the City of Carlsbad's Habitat Management Plan (Carlsbad HMP) under the Northwestern San Diego County Multiple Habitat Conservation Plan (MHCP), and whether such exclusion is appropriate and why.

(11) The Secretary's consideration to exercise his discretion under section 4(b)(2) of the Act to exclude lands proposed in Unit 12 that are within the area addressed by the County of San Diego Subarea Plan and the City of San Diego Subarea Plan under the San Diego Multiple Species Conservation Plan (MSCP), and whether such exclusion is appropriate and why.

(12) Special management considerations or protection that the physical and biological features essential to the conservation of the species may require.

(13) Information on any quantifiable economic costs or benefits of the proposed revised designation of critical habitat.

(14) Information on the currently predicted effects of climate change on *Brodiaea filifolia* and its habitat.

(15) Whether we could improve or modify our approach to designating critical habitat in any way to provide for greater public participation and

understanding, or to better accommodate concerns and comments.

Our final determination concerning critical habitat for *Brodiaea filifolia* will take into consideration all written comments and any additional information we receive during the comment period. These comments are included in the public record for this rulemaking and we will fully consider them in the preparation of our final determination. On the basis of public comments, we may, during the development of our final determination, find that areas within the proposed designation do not meet the definition of critical habitat, that some modifications to the described boundaries are appropriate, or that areas may or may not be appropriate for exclusion under section 4(b)(2) of the Act.

You may submit your comments and materials concerning this proposed rule by one of the methods listed in the **ADDRESSES** section. We will not consider comments sent by e-mail or fax or to an address not listed in the **ADDRESSES** section.

If you submit a comment via *http://www.regulations.gov*, your entire comment—including your personal identifying information—will be posted on the Web site. If you submit a hardcopy comment that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so.

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on *http://www.regulations.gov*, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Carlsbad Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Background

It is our intent to discuss only those topics directly relevant to the proposed revision of critical habitat for *Brodiaea filifolia*. This proposed rule incorporates new information on family placement (biological taxonomic classification) and the distribution of *B. filifolia* that we did not discuss in the 2005 final critical habitat designation for this plant. No new information pertaining to the species' life history, ecology, or habitat was received following the 2005 final critical habitat designation. A summary of topics that are relevant to this proposed revised critical habitat is provided below. For more information on *B. filifolia*, refer to the final listing rule published in the **Federal Register** on October 13, 1998 (63 FR 54975), and the designation of critical habitat for *B. filifolia* published in the **Federal Register** on December 13, 2005 (70 FR 73820). Additionally, more information on this species can be found in the five-year review for *B. filifolia* signed on August 13, 2009, which is available on our Web site at: *http//:www.fws.gov/Carlsbad*.

Species Description

Brodiaea filifolia is a perennial herb with dark-brown, fibrous-coated corms (underground, bulb-like storage stem). Corms function similarly to bulbs such that they store water and nutrients during the dormant season (Smith 1997, p. 28). The flower stalks (scapes) are 8 to 16 inches (in) (20 to 40 centimeters (cm)) tall. The leaves are basal, narrow, and shorter than the stalk, and the flowers are arranged in a loose umbel (all flowers are attached to the stalk at the same place and then radiate outward). Violet flowers start as tubes and then break into six spreading perianth (collective term for sepals and petals) segments that are 0.4 to 0.5 in (9 to 12 millimeters (mm)) long. The broad and notched anthers are 0.1 to 0.2 in (3 to 5 mm) long, and the fruit is a capsule (Munz 1974, pp. 877–878; Keator 1993, pp. 1180, 1182; 63 FR 54975, p. 54976). *Brodiaea filifolia* can be distinguished from other species of *Brodiaea* that occur within its range (*B. orcuttii* (Orcutt's brodiaea), *B. jolonensis* (Mesa brodiaea), *B. santarosae* (Santa Rosa basalt brodiaea), and *B. terrestris* ssp. *kernensis* (dwarf brodiaea)) by its narrow, pointed staminodia (characteristic sterile stamens), short filament (flower part attaching the fertile anthers to the perianth), spreading perianth segments (saucer-shaped flower), and a thin perianth tube, which is subsequently split by developing fruit (Niehaus 1971, p. 37; Munz 1974, pp. 877–878; Chester *et al.* 2007, pp. 191–196).

Species Biology and Life History

The annual growth cycle of *Brodiaea filifolia* begins in fall when the first rains break the summer dormancy of the underground corm (Niehaus 1971, p. 4; Keator 1993, p. 1180). The leaves reach their full length during February and March (Niehaus 1971, p. 5). A solitary flower stalk grows from the corm in March or April and the flower period extends from late April to early June (CNPS 2001, p. 99; Niehaus 1971, pp. 7-9). In some years, only a few flowers bloom within an occurrence; during other years, several thousand flowers can be found in the larger occurrences.

In the summer months, the seed capsules of *Brodiaea filifolia* mature. The seeds are released and fall to the ground, either on the surface or into cracks in the soil. During fall and winter rains, the clay matrix hydrates, softens, and expands, which causes the cracks to close; following this soil hydration period, seedlings emerge with leaves and a specialized root. Seedlings of *B. filifolia* are equipped with a specialized, succulent contractile root that is lost by mature corms and facilitates the seasonal downward movement of the young plant (Niehaus 1971, p. 4). The contractile root swells with moisture in the wet season, creating space below the developing cormlet. As the soil dries, the contractile root dries and shrinks longitudinally, drawing the young cormlet downward in the soil. This process continues to a point at which the soil moisture is adequate to keep the contractile root from shrinking, resulting in the location of the corm in the appropriate soil horizon for survival. Cormlets produced annually from existing older corms also produce contractile roots that draw them laterally away from the parent corm (Niehaus 1971, p. 4).

Brodiaea filifolia reproduces vegetatively by producing ''cormlets'' that break off from the mature corms, and sexually by producing seeds (Niehaus 1971, p. 4). All species of *Brodiaea* examined to date are self-incompatible, meaning they are incapable of producing seeds with pollen from flowers on the same plant or from flowers of plants with the same allele (or different form of a gene) at the self-incompatibility gene locus/loci (Niehaus 1971, p. 27). Therefore, cross-pollination from plants of the same species but with different alleles at this locus is necessary for successful reproduction to occur (Niehaus 1971, p. 27). Upon maturity, three segments of the vertically oriented capsules split apart, revealing many small (0.08 to 0.10 in long; 2 to 2.5 mm long) black seeds (Munz 1974, p. 878). The seeds are then dispersed as wind rattles the capsules (Smith 1997, p. 29). Dispersal of seeds from an individual is likely localized, leading to patches of plants with the same self-incompatible alleles. This means that effective pollination for seed set requires the maintenance of pollinator habitat and dispersal corridors. The vegetative reproduction of small cormlets by the corm allows individual plants to reproduce vegetatively; however, sexual reproduction by seeds is necessary to continue the process of sexual selection and evolution. Active pollinators in and

around occurrences of *Brodiaea filifolia* assure that the flowers will be pollinated and that viable seeds will be produced. Therefore, supporting and maintaining pollinators and pollinator habitat is essential for the long-term conservation of *B. filifolia* (Niehaus 1971, p. 27).

Habitat

As described in the listing rule (October 13, 1998; 63 FR 54975, pp. 54976–54977), *Brodiaea filifolia* typically occurs on gentle hillsides, valleys, and floodplains within mesic (moderately moist), southern needlegrass grassland and alkali grassland plant communities that are associated with clay, loamy sand, or alkaline silty-clay soils (California Department of Fish and Game (CDFG) 1981, p. 3; Bramlet 1993, pp. 6–7). Sites occupied by this species are frequently intermixed with (or near) coastal sage scrub, chaparral, or vernal pool habitat (63 FR 54975, p. 54976).

We refined the description of suitable habitat in the 2005 final rule designating critical habitat for *Brodiaea filifolia* (70 FR 73820; December 13, 2005) in response to comments we received from peer reviewers. We stated that this species is usually found in herbaceous plant communities such as valley needlegrass grassland, valley sacaton grassland, nonnative grassland, alkali playa, southern interior basalt vernal pools, San Diego mesa hardpan vernal pools, and San Diego mesa claypan vernal pools (Holland 1986, pp. 34–37, 41, 44). *Brodiaea filifolia* also grows in open areas in shrub-dominated coastal sage scrub ecosystems (70 FR 73820, p. 73837). The herbaceous communities that *B. filifolia* is a part of occur in open areas on clay soils, soils with a clay subsurface, or clay lenses within loamy, silty loam, loamy sand, silty deposits with cobbles or alkaline soils, ranging in elevation from 100 feet (ft) (30 meters(m)) to 2,500 ft (765 m), depending on soil series. These soils facilitate the natural process of seed dispersal and germination, cormlet disposition or movement to an appropriate soil depth, and corm persistence through seedling and adult phases of flowering and fruit set (70 FR 73820, p. 73837).

Spatial Distribution and Historical Range

The historical range of *Brodiaea filifolia* extends from the foothills of the San Gabriel Mountains in the City of Glendora (Los Angeles County), east to Arrowhead Hot Springs in the western foothills of the San Bernardino Mountains (San Bernardino County), and south through eastern Orange and western Riverside Counties to Rancho Santa Fe in central coastal San Diego County, California (California Natural Diversity Database (CNDDB) 2007).

At the time of listing in 1998, 46 historical occurrences of *Brodiaea filifolia* were reported (63 FR 54975, p. 54977). Nine of these occurrences, most from San Diego County, were considered extirpated, leaving 37 occurrences presumed extant at the time of listing. Eight documented extant occurrences were not accounted for in the final listing rule because we lacked specific data on these occurrences. In our 2009 5–year review of *B. filifolia*, we reassessed the occurrence data on this species. Due to the discovery of new occurrences, regrouping of occurrences, and the extirpation of 3 occurrences after listing, we concluded in the 5–year review that there are now 68 extant (or presumed extant) occurrences of *B. filifolia*. Most importantly to our reassessment of this species were 23 additional occurrences detected within the known range of the species following the 1998 listing. The identification of these new occurrences was a result of surveys conducted in locations that had not been surveyed prior to 1998. These 23 occurrences are located in the following areas: (1) Four occurrences are in Orange County at Trampas Canyon, Middle Gabino, East Talega, and Prima Deshecha landfill; (2) ten occurrences are in San Diego County on Marine Corps Base Camp Pendleton (MCB Camp Pendleton); (3) seven occurrences are in San Diego County (outside of MCB Camp Pendleton) in the City of Oceanside (Arbor Creek, Vista Pacific, Buena Vista Creek Preserve), City of Carlsbad (Calavera Village H, Carlsbad Oaks), City of San Marcos (Oleander site), and at Artesian Trails near 4S Ranch; and (4) two occurrences are in Riverside County along the San Jacinto River at the intersection of San Jacinto Avenue and Dawson Road, and on the Santa Rosa Plateau at Corona Cala Camino.

For the purpose of this proposed revised critical habitat, we consider the areas where *Brodiaea filifolia* has been found since listing to be within the geographical area occupied by the species at the time of listing (1998). As with many species, greater efforts to conduct surveys may result in a greater number of known occurrences being identified (Ferren *et al.* 1995). The 23 new occurrences are all in relative proximity and in similar habitats to occurrences that were known at the time of listing. Additionally, *B. filifolia* is thought to have limited dispersal capabilities and is limited to specific habitat types making it unlikely that new occurrences are frequently established. Most of the new occurrences found since listing have population sizes of more than 1,000 plants, indicating that they were not recently established since it would take several years for an occurrence from a limited number of dispersing seeds to reach a population of this size. Therefore, we believe that all known occurrences of *B. filifolia* are within the geographical area occupied at the time this species was listed under the Act. Furthermore, additional translocated occurrences (occurrences moved from one location to another) are also within the geographical area occupied by the species at the time of listing.

Abundance

The size of each *Brodiaea filifolia* population is often measured by counting numbers of standing flower stalks. Because many *B. filifolia* corms do not produce flowering stalks each year, this method of counting may result in a number of vegetative plants and corms going undetected in surveys (Taylor and Burkhart 1992, pp. 1-7; Morey 1995, p. 2; Vinje 2008, pers. comm.). For this reason, any number of individuals observed at a site should be considered an estimate of the minimum number of plants present. We consider these estimates useful in comparing the relative abundance of *B. filifolia* at various sites across the species' range because these numbers provide an approximate measure of the size of the occurrence.

Some researchers have conducted studies to provide data on the ratio of flowering stalks to the actual number of individual *Brodiaea filifolia* plants that may be present at a site. A field study at the Santa Rosa Plateau Ecological Reserve revealed an 8:1 ratio of non-flowering corms to flowering plants (12.5 percent flowered) (Morey 1995, p. 2). At a residential development site in the City of Carlsbad, only 20 plants (0.25 percent) flowered, where 8,000 corms were later located (Taylor and Burkhart 1992, pp. 1-7). In 2007—a dry year—Vinje (2008, pers. comm.) reported that 14,373 vegetative *B. filifolia* plants were counted within three research plots at the Rancho La Costa occurrence in Carlsbad, but none of the plants flowered (Vinje 2008, pers. comm.). Even in a wet year, only 2 to 26 percent of the plants within the plots at Rancho La Costa flowered (Vinje 2008, pers. comm.). In this proposed revised critical habitat, we are using the number of flowering stalks at each site (i.e., the maximum recorded number) as a relative measure of the occurrence's

size rather than an absolute measure of the occurrence size. In that context, the existing plant count data is useful in comparing the relative size of different occurrences to one another.

To date, no systematic surveys of all known occurrences of *Brodiaea filifolia* have been conducted. There is little consistent range-wide information about abundance or population trends in *B. filifolia*. Current estimates suggest that the majority of *B. filifolia* occurrences contain 2,000 or fewer individuals (Service 2009, pp. 8–13). The areas containing the largest occurrences (3,000 or more) are at the following locations: San Dimas in Los Angeles County; Santa Rosa Plateau Ecological Reserve, San Jacinto Wildlife Area, Case Road, and Railroad Canyon in Riverside County; Aliso and Wood Canyon Wilderness Park, and Cristianitos Canyon in Orange County; and Upham, Oleander/San Marcos Elementary, Rancho Carrillo, Letterbox Canyon, Rancho La Costa, and Taylor/Darwin in San Diego County.

Taxonomy and Family Placement – Movement of Brodiaea From Liliaceae (Lily Family) to Themidaceae (Cluster Lily Family)

The name and description of *Brodiaea filifolia* have not changed since listing under the Act. However, as described below, the family in which the plant is placed has changed from Liliaceae (lily family) to Themidaceae (cluster lily family). Additionally, plants that were previously identified as hybrids and not pure *B. filifolia* have now been described as a new species, *B. santarosae*. Pires (2007, p. 1) and Preston (2007, pers. comm.) intend to include *Brodiaea santarosae* as a separate species in their treatment of the genus *Brodiaea* for the revision of the Jepson Manual that is in progress; this is based on their assessment of Chester *et al.* (2007, pp. 187–198). The following text describes movement of the genus *Brodiaea* from Liliaceae to Themidaceae.

When we listed *Brodiaea filifolia* as a threatened species on October 13, 1998 (63 FR 54975), it was considered part of a large and broadly defined family known as Liliaceae. *Brodiaea* and several other genera including *Bloomeria, Dichelostemma, Triteleia,* and *Allium* historically were placed in the Amaryllidaceae (amaryllis family) or the Liliaceae based on perceived importance of characters related to the position of the ovary or the inflorescence type. Salisbury (1866) recognized a group of several genera that includes taxa now named *Brodiaea* as a family, which was distinct from *Allium* and other genera in the Liliaceae, and subsequently named the new family Themidaceae (Salisbury 1866, pp. 84–87). Recent molecular and anatomical studies support recognition of Salisbury's Themidaceae family. First, Fay and Chase (1996, pp. 441–451) present evidence that several genera, including *Triteleia, Brodiaea, Bloomeria,* and *Dichelostemma*, form a distinct group for which the earliest name available for this group at the family rank is Themidaceae. Second, genera in the Themidaceae share a common ancestor (the included members are termed monophyletic) that is supported by phylogenetic analyses of morphological data and plastid DNA sequences (Pires *et al.* 2001, pp. 601–626; Pires and Sytsma 2002, pp. 1342–1359). Genetic and morphological analysis of members of the Themidaceae, as described by Salisbury and other related groups, support the placement of the genus *Brodiaea* into the Themidaceae (Pires *et al.* 2001, pp. 610–626).

Brodiaea is retained in the family Liliaceae in the recent Flora of North America (Pires 2002, p. 321); however, the author of the family description (Utech 2002, p. 52) includes a table that lists *Brodiaea* as a member of the Themidaceae and states that the available evidence strongly supports dismemberment of the Liliaceae. The family Themidaceae, including *Brodiaea,* will be recognized as a family separate from Liliaceae in the upcoming revision of the Jepson Manual (Pires 2007, p. 1; Preston 2007, pers. comm.). We have reviewed this material and we are in agreement with the change from Liliaceae to Themidaceae. As part of this rule, we propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations to reflect the transfer of *B. filifolia* from Liliaceae to Themidaceae. This transfer does not alter the definition or distribution of *B. filifolia.*

Previous Federal Actions

We published our final designation of critical habitat for *Brodiaea filifolia* on December 13, 2005 (70 FR 73820). The Center for Biological Diversity filed a complaint in the U.S. District Court for the Southern District of California on December 19, 2007, challenging our designation of critical habitat for *B. filifolia* and *Navarretia fossalis* (*Center for Biological Diversity* v. *United States Fish and Wildlife, et al.,* Case No. 07–CV–02379–W–NLS). In a settlement agreement dated July 25, 2008, we agreed to reconsider the critical habitat designation for *B. filifolia*. The settlement stipulated that the Service shall submit a proposed revised critical habitat designation for *B. filifolia* to the **Federal Register** by December 1, 2009, and submit a final revised critical habitat designation to the **Federal Register** by December 1, 2010.

Critical Habitat

Critical habitat is defined in section 3 of the Act as:

(1) The specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features

(a) essential to the conservation of the species and

(b) which may require special management considerations or protection; and

(2) Specific areas outside the geographical area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Conservation, as defined under section 3 of the Act, means the use of all methods and procedures that are necessary to bring any endangered or threatened species to the point at which the measures provided under the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management, such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot otherwise be relieved, may include regulated taking.

Critical habitat receives protection under section 7(a)(2) of the Act through the prohibition against Federal agencies carrying out, funding, or authorizing activities that are likely to result in the destruction or adverse modification of critical habitat. Section 7(a)(2) requires consultation on Federal actions that may affect critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation does not allow the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by non-Federal landowners. Where a landowner seeks or requests Federal agency funding or authorization for an action that may affect a listed species or critical habitat, the consultation requirements of section 7(a)(2) of the Act would apply, but even in the event

of a destruction or adverse modification finding, the Federal action agency's and the applicant's obligation is not to restore or recover the species, but to implement reasonable and prudent alternatives to avoid destruction or adverse modification of critical habitat.

For inclusion in a critical habitat designation, the habitat within the geographical area occupied by the species at the time of listing must contain physical and biological features that are essential to the conservation of the species, and be included only if those features may require special management considerations or protection. Critical habitat designations identify, to the extent known using the best scientific and commercial data available, habitat areas supporting the essential physical or biological features that provide essential life cycle needs of the species; that is, areas on which are found the primary constituent elements (PCEs) laid out in the appropriate quantity and spatial arrangement essential to the conservation of the species. Under the Act and regulations at 50 CFR 424.12, we can designate critical habitat in areas outside the geographical area occupied by the species at the time it is listed only when we determine that those areas are essential for the conservation of the species and that designation limited to the species' present range would be inadequate to ensure the conservation of the species.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific and commercial data available. Further, our Policy on Information Standards Under the Endangered Species Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658)), and our associated Information Quality Guidelines provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When we are determining which areas should be designated as critical habitat, our primary source of information is generally the information developed during the listing process for the species. Additional information sources may include the recovery plan for the species, articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, biological assessments, or other unpublished materials and expert opinion or personal knowledge.

Habitat is often dynamic, and species may move from one area to another over time. In particular, we recognize that climate change may cause changes in the arrangement of occupied habitat patches. Current climate change predictions for terrestrial areas in the Northern Hemisphere indicate warmer air temperatures, more intense precipitation events, and increased summer continental drying (Field *et al.* 1999, pp. 1–3; Hayhoe *et al.* 2004, p. 12422; Cayan *et al.* 2005, p. 6; Intergovernmental Panel on Climate Change 2007, p. 11; Cayan *et al.* 2009, p. xi). Additionally, the southwestern region of the country is predicted to become drier and hotter overall (Hayhoe *et al.* 2004, p.12424; Seager *et al.* 2007, p. 1181). Climate change may also affect the duration and frequency of drought and these climatic changes may become even more dramatic and intense (Graham 1997). Documentation of climate-related changes that have already occurred in California (Croke *et al.* 1998, pp. 2128, 2130; Brashears *et al.* 2005, p. 15144), and future drought predictions for California (e.g., Field *et al.* 1999, pp. 8–10; Lenihen *et al.* 2003, p. 1667; Hayhoe *et al.* 2004, p. 12422; Brashears *et al.* 2005, p. 15144; Seager *et al.* 2007, p. 1181) and North America (IPCC 2007, p. 9) indicate prolonged drought and other climate-related changes will continue in the foreseeable future.

We anticipate these changes will affect *Brodiaea filifolia* habitat and occurrences. For example, if the amount and timing of precipitation or the average temperature increases in southern California, the following four changes may affect the long-term viability of *B. filifolia* occurrences in their current habitat configuration: (1) Drier conditions may result in a lower percent germination and smaller population sizes; (2) a shift in the timing of the annual rainfall may favor nonnative species that impact the quality of habitat for this species; (3) warmer temperatures may affect the timing of pollinator life-cycles causing pollinators to become out-of-sync with timing of flowering *B. filifolia*; and (4) drier conditions may result in increased fire frequency, making the ecosystems in which *B. filifolia* currently grows more vulnerable to the threats of subsequent erosion and nonnative/native plant invasion.

At this time, we are unable to identify the specific ways that climate change will impact *Brodiaea filifolia*, therefore, we are unable to determine what additional areas, if any, may be appropriate to include in the proposed revised critical habitat for this species. We specifically request information from the public on the currently predicted effects of climate change on *B. filifolia* and its habitat. Additionally, we recognize that critical habitat designated at a particular point in time may not include all of the habitat areas that we may later determine are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not promote the recovery of the species.

Areas that support occurrences, but are outside the critical habitat designation, will continue to be subject to conservation actions we and other Federal agencies implement under section 7(a)(1) of the Act. They are also subject to the regulatory protections afforded by the section 7(a)(2) jeopardy standard, as determined on the basis of the best available scientific information at the time of the agency action. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans (HCPs), or other species conservation planning efforts if new information available to these planning efforts calls for a different outcome.

Methods

As required by section 4(b) of the Act, we used the best scientific and commercial data available in determining which areas within the geographic area occupied by the species at the time of listing contain the features essential to the conservation of *Brodiaea filifolia*, and which areas outside the geographical area occupied at the time of listing are essential for the conservation of *B. filifolia*. We reviewed the 2005 final critical habitat designation for *B. filifolia* (70 FR 73820), information from state, Federal, and local government agencies, and information from academia and private organizations that collected scientific data on the species. We also used the information provided in the 5–year review for *B. filifolia* (Service 2009, pp. 1–47). Other information we used for this proposed revised critical habitat

includes: CNDDB (CNDDB 2009, pp. 1–73); data and information included in reports submitted during consultations under section 7 of the Act; information contained in analyses for individual and regional HCPs where *B. filifolia* is a covered species; data collected on MCB Camp Pendleton; data collected from reports submitted by researchers holding recovery permits under section 10(a)(1)(A) of the Act; information received from local species experts; published and unpublished papers, reports, academic theses, or surveys; Geographic Information System (GIS) data (such as species occurrence data, soil data, land use, topography, aerial imagery, and ownership maps); and correspondence to the Service from recognized experts. We are not currently proposing any areas as critical habitat that are outside the geographical area occupied by the species at the time of listing because we have determined that we can conserve this species by including in critical habitat a subset of areas that were occupied at the time of listing (28 of 68 occurrences known to be occupied are proposed as critical habitat).

Physical and Biological Features

In accordance with section 3(5)(A)(i) and 4(b)(1)(A) of the Act and regulations at 50 CFR 424.12(b), in determining which areas within the geographical area occupied at the time of listing to propose as revised critical habitat, we consider those physical and biological features that are essential to the conservation of the species and which may require special management considerations or protection. We consider the essential physical and biological features to be the PCEs laid out in the appropriate quantity and spatial arrangement essential to the conservation of the species. The PCEs include, but are not limited to:

(1) Space for individual and population growth and for normal behavior;

(2) Food, water, air, light, minerals, or other nutritional or physiological requirements;

(3) Cover or shelter;

(4) Sites for breeding, reproduction, and rearing (or development) of offspring; and

(5) Habitats that are protected from disturbance or are representative of the historical, geographical, and ecological distributions of a species.

We derive the PCEs required for *Brodiaea filifolia* from its biological needs. The areas included in our proposed revised critical habitat for *B. filifolia* contain the appropriate soils and associated vegetation at suitable elevations, and adjacent areas necessary to maintain associated physical processes such as a suitable hydrological regime. The areas provide suitable habitat, water, minerals, and other physiological needs for reproduction and growth of *B. filifolia*, as well as habitat that supports pollinators of *B. filifolia*. The PCEs and the resulting physical and biological features essential to the conservation of *B. filifolia* are derived from studies of this species' habitat, ecology, and life history as described in the **Background** section of this proposed rule, and the previous critical habitat rule (70 FR 73820; December 13, 2005), and in the final listing rule (63 FR 54975; October 13, 1998).

Space for Individual and Population Growth, and for Normal Behavior

Habitats that provide space for growth and persistence of *Brodiaea filifolia* include areas: (1) With combinations of appropriate elevation and clay or clay-associated soils, on mesas or low to moderate slopes that support open native or annual grasslands within open coastal sage scrub or coastal sage scrub-chaparral communities; (2) in floodplains or in association with vernal pool or playa complexes that support various grassland or scrub communities; (3) on soils derived from olivine basalt lava flows on mesas and slopes that support vernal pools within grassland, oak woodland, or savannah communities; or (4) on sandy loam soils derived from basalt and granodiorite parent material with deposits of cobbles and boulders supporting intermittent seeps, and open marsh communities. Despite the wide range of habitats where *B. filifolia* occurs, this species occupies a specific niche of habitat that is moderately wet to occasionally wet.

Food, Water, Air, Light, Minerals, or Other Nutritional or Physiological Requirements

All members of the genus *Brodiaea* require full sun and many tend to occur on only one or a few soil series (Niehaus 1971, pp. 26-27). *Brodiaea filifolia* occurs on several formally named soil series, but these are all primarily clay soils with varying amounts of sand and silt. In this proposed rule, we listed all the mapped soils that overlap with the distribution of *B. filifolia*. Sometimes clay soils occur as inclusions within other soil series, as such, we have named those other soil series in this rule. Another reason that there are many differently named soil series is because this species occurs in five counties, each of which has uniquely named soils. Despite the diversity in named soil series, *B. filifolia* is a clay soils endemic and always occurs on soils with a clay component.

In San Diego, Orange, and Los Angeles Counties, occurrences of *Brodiaea filifolia* are highly correlated with specific clay soil series such as, but not limited to: Alo, Altamont, Auld, and Diablo or clay lens inclusions in a matrix of loamy soils such as Fallbrook, Huerhuero, and Las Flores series (63 FR 54975, p. 54978; CNDDB 2009, pp. 1-76; Service GIS data 2009). These soils generally occur on mesas and hillsides with gentle to moderate slopes, or in association with vernal pools. These soils are generally vegetated with open native or nonnative grassland, open coastal sage scrub, or open coastal sage scrub-chaparral communities. In San Bernardino County, the species is associated with Etsel family–Rock outcrop-Springdale and Tujunga–Urban land–Hanford soils (Service GIS data 2009). These soils are generally vegetated with open native and nonnative grasslands, open coastal sage scrub, or open coastal sage scrub-chaparral communities.

In western Riverside County, the species is often found on alkaline silty-clay soil series such as, but not limited to, Domino, Grangeville, Waukena, and Willows underlain by a clay subsoil or caliche (a hardened gray deposit of calcium carbonate). These soils generally occur in low-lying areas and floodplains or are associated with vernal pool or playa complexes. These soils are generally vegetated with open native and nonnative grasslands, alkali grassland, or alkali scrub communities. Also in western Riverside County, the species is found on clay loam soils underlain by heavy clays derived from basalt lava flows (i.e., Murrieta series on the Santa Rosa Plateau) (Bramlet 1993, p. 1; CNDDB 2009, pp. 1-76; Service GIS data 2009). These soils generally occur on mesas and gentle to moderate slopes or are associated with basalt vernal pools. These soils are vegetated with open native or nonnative grasslands or oak woodland savannah communities.

In some areas in northern San Diego County and southwestern Riverside County, the species is found on sandy loam soils derived from basalt and granodiorite parent materials; deposits of gravel, cobble, and boulders; or hydrologically fractured, weathered granite in intermittent streams and seeps. These soils and deposits are generally vegetated by open riparian and freshwater marsh communities associated with intermittent drainages, floodplains, and seeps. Throughout *B. filifolia*'s range these soils facilitate the natural process of seed dispersal and

germination, cormlet disposition or movement to an appropriate soil depth, and corm persistence through seedling and adult phases of flowering and fruit set described earlier.

Habitats That Are Protected From Disturbance or Are Representative of the Historical, Geographical, and Ecological Distributions of the Species

The conservation of *Brodiaea filifolia* is dependent on several factors including, but not limited to, maintenance of areas of sufficient size and configuration to sustain natural ecosystem components, functions, and processes (such as full sun exposure, natural fire and hydrologic regimes, adequate biotic balance to prevent excessive herbivory); protection of existing substrate continuity and structure, connectivity among groups of plants within geographic proximity to facilitate gene flow among the sites through pollinator activity and seed dispersal; and sufficient adjacent suitable habitat for vegetative reproduction and population expansion.

A natural, generally intact surface and subsurface soil structure, not permanently altered by anthropogenic land use activities (such as deep, repetitive discing, or grading), and associated physical processes such as a hydrological regime is necessary to provide water, minerals, and other physiological needs for *Brodiaea filifolia*. A natural hydrological regime includes seasonal hydration followed by drying out of the substrate to promote growth of plants and new corms for the following season. These conditions are also necessary for the normal development of seedlings and young vegetative cormlets.

Habitat for Pollinators of Brodiaea filifolia

Cross-pollination is essential for the survival and recovery of *Brodiaea filifolia* because this species is self-incompatible and it cannot sexually reproduce without the aid of insect pollinators. A variety of insects are known to cross-pollinate *Brodiaea* species, including Tumbling Flower Beetles (Mordellidae, Coleoptera) and Sweat Bees (Halictidae, Hymenoptera; Niehaus 1971, p. 27). Bell and Rey (1991, p. 3) report that native bees observed pollinating *B. filifolia* on the Santa Rosa Plateau in Riverside County include *Bombus californicus* (Apidae, Hymenoptera), *Hoplitus* sp. (Megachilidae, Hymenoptera), *Osmia* sp. (Megachilidae, Hymenoptera), and an unidentified Anthophorid (digger-bee). Anthophoridae and Halictidae are important pollinators of *Brodiaea filifolia*, as shown at a study site in Orange County (Glenn Lukos Associates 2004, p. 3). Supporting and maintaining pollinators and pollinator habitat is essential for the conservation of *B. filifolia* because this species cannot set viable seed without cross-pollination.

Of primary concern to the conservation of *Brodiaea filifolia* are solitary bees (such as sweat bees (*Hoplitus* sp. and *Osmia* sp.)) because these are the pollinators that have the most specific habitat requirements (such as nesting requirements) and are impacted by fragmentation and reduced diversity of natural habitats at a small scale (Gathmann and Tscharntke 2002, p. 757; Steffan-Dewenter 2003, p. 1041; Shepherd 2009, pers. comm.). Due to the focused foraging habits of solitary bees we believe that these insects may be the most important to the successful reproduction of *B. filifolia*. To sustain an active pollinator community for *B. filifolia*, alternative pollen or food source plants may be necessary for the persistence of these insects when *B. filifolia* is not in flower. It is also necessary for nest sites for pollinators to be located within flying distance of *B. filifolia* occurrences.

Bombus spp. (bumblebees) may also be important to the pollination of *Brodiaea filifolia*, however, these insects may be able to travel greater distances and cross fragmented landscapes to pollinate *B. filifolia*. In a study of experimental isolation and pollen dispersal of *Delphinium nuttallianum* (Nuttall's larkspur), Schulke and Waser (2001, pp. 242–243) report that adequate pollen loads were dispersed by bumblebees within control populations and in isolated experimental ''populations'' from 164 to 1,312 feet (ft) (50 to 400 meters (m)) distant from the control populations. One of several pollinator taxa effective at 1,312 ft (400 m) was *Bombus californicus* (Schulke and Waser 2001, pp. 240–243), which was also one of four bee species observed pollinating *Brodiaea filifolia* by Bell and Rey (1991, p. 2). Studies by Steffan-Dewenter and Tscharntke (2000, p. 293) demonstrated that it is possible for bees to forage as far as 4,920 ft (1,500 m) from a colony, and at least one study suggests that bumblebees may forage many kilometers away (Sudgen 1985, p. 308). Bumblebees may be effective at transferring pollen between occurrences of *B. filifolia* because they are larger and have been found pollinating plants at distances of 1,312 to 4,920 ft (400 to 1500 m). However, the visits and focused effort of bumblebees may be less frequent than ground-nesting bees.

Ground-nesting solitary bees appear to have limited dispersal and flight abilities (Thorp and Leong 1995, p. 7). Studies have shown that as areas are fragmented by development, remaining habitat areas have reduced pollinator diversity (Steffan-Dewenter 2003, p. 1041). If pollinators are eliminated from an occurrence, *Brodiaea filifolia* will no longer be able to reproduce sexually. Of the native bees that have been observed pollinating *B. filifolia*, solitary ground-nesting bees are the most sensitive to habitat disturbance and the most likely to be lost from an area. Sweat bees (family Halictidae), *Holitus* (family Magachilidea), and Osmia (mason bees, family Megachilidea), fly approximately 900 to 1,500 ft (274 to 457 m), 600 to 900 ft (183 to 274 m), and 600 to 1,800 ft (183 to 549 m), respectively (Shepherd 2009, pers. comm.). *Bombus californicus* (family Apidae) and Digger bees (family Apidae) fly further, generally more than over 2,640 ft (804 m) (Shepherd 2009, pers. comm.). These flight distances are important in determining what habitat associated with *Brodiaea filifolia* occurrences provides habitat for this species' pollinators. Conserving habitat where these pollinators nest and forage will sustain an active pollinator community and provide for the cross-pollination of *B. filifolia*.

In our review of the data on pollinators of *Brodiaea filifolia* in the 2005 critical habitat rule, we determined that an 820-ft (250-m) area around each occurrence identified in the critical habitat would provide adequate space to support *B. filifolia*'s pollinators. In the 2005 critical habitat rule, we based the 820-ft (250-m) distance on a conservative estimate for the mean routine flight distance for bees. This distance represents an estimate of flight distance for pollinators that fly an average of less than 1,800 ft (549 m) (i.e., the maximum distance observed by known pollinators of *B. filifolia* except *Bombus californicus*). Research supports this distance, as studies looking at areas with a radius of 820 ft (250 m) have found that solitary bees forage at this scale and that if fragmentation occurs at this scale the presence of solitary bees will decrease (Steffan-Dewenter *et al.* 2002, pp. 1027-1029; Shepherd 2009, pers. comm.). Insects that travel greater distances than 1,800 ft (549 m) on average may also find habitat within 820 ft (250 m) of *Brodiaea filifolia* occurrences. It is also possible that insects flying greater than 1,800 ft (549 m) are flying in from greater distances (*Bombus californicus* and *Anthophora*) and are living in habitats that are not directly connected with areas supporting *Brodiaea filifolia*.

Delineating a pollinator use area larger than 820 ft (250 m) around *B. filifolia* would capture habitat that may not directly contribute to the survival or recovery of *B. filifolia*. Including habitat out from the mapped occurrences of *B. filifolia* up to 820 ft (250m) in the PCEs is necessary to support pollinator activity in critical habitat, support the sexual reproduction of *B. filifolia,* and provide for gene flow, pollen dispersal, and seed dispersal.

Primary Constituent Elements for Brodiaea filifolia

Pursuant to the Act and its implementing regulations, when considering the designation of critical habitat, we must focus on the primary constituent elements within the geographical area occupied by *Brodiaea filifolia* at the time of listing that are essential to the conservation of the species and may require special management considerations or protection. The essential physical and biological features are those PCEs laid out in an appropriate quantity and spatial arrangement determined to be essential to the conservation of the species. All areas proposed as revised critical habitat for *B. filifolia* are currently occupied, are within the geographical area occupied by the species at the time of listing, and contain sufficient PCEs to support at least one life- history function (see the ''*Spatial Distribution and Historical Range*'' section of this rule).

Based on our current knowledge of the life history, biology, and ecology of *Brodiaea filifolia*, and the requirements of the habitat to sustain the life-history traits of the species, we determined that the PCEs specific to *B. filifolia* are:

(1) PCE 1—Appropriate soil series at a range of elevations and in a variety of plant communities, specifically:

(A) Clay soil series of various origins (such as Alo, Altamont, Auld, or Diablo), clay lenses found as unmapped inclusions in other soils series, or loamy soils series underlain by a clay subsoil (such as Fallbrook, Huerhuero, or Las Flores) occurring between the elevations of 100 and 2,500 ft (30 and 762 m).

(B) Soils (such as Cieneba-rock outcrop complex and Ramona family-Typic Xerothents soils) altered by hydrothermal activity occurring between the elevations of 1,000 and 2,500 ft (305 and 762 m).

(C) Silty loam soil series underlain by a clay subsoil or caliche that are generally poorly drained, moderately to strongly alkaline, granitic in origin (such as Domino, Grangeville, Traver, Waukena, or Willows) occurring between the elevations of 600 and 1,800 ft (183 and 549 m).

(D) Clay loam soil series (such as Murrieta) underlain by heavy clay loams or clays derived from olivine basalt lava flows occurring between the elevations of 1,700 and 2,500 ft (518 and 762 m).

(E) Sandy loam soils derived from basalt and granodiorite parent materials; deposits of gravel, cobble, and boulders; or hydrologically fractured, weathered granite in intermittent streams and seeps occurring between 1,800 and 2,500 ft (549 and 762 m).

(2) PCE 2—Areas with a natural, generally intact surface and subsurface soil structure, not permanently altered by anthropogenic land use activities (such as deep, repetitive discing, or grading), extending out up to 820 ft (250 m) from mapped occurrences of *Brodiaea filifolia*.

This proposed revision to the critical habitat designation is designed for the conservation of those areas containing PCEs necessary to support the species' life-history traits. All units/subunits of the proposed critical habitat contain one of the specific soil components identified in PCE 1 and have natural, generally intact surface and subsurface soil structure and support habitat for pollinators as identified in PCE 2. These two factors are sufficient to support life-history traits of *Brodiaea filifolia* in the units/subunits we propose as critical habitat. In general, we propose units/subunits based on the presence of the PCEs in the appropriate quantity and spatial arrangement essential to the conservation of the species. In the case of this designation, all of the units/subunits contain both of the PCEs.

Special Management Considerations or Protection

When designating critical habitat within the geographical area occupied by the species at the time of listing, we assess whether the physical and biological features essential to the conservation of the species may require special management considerations or protection. In all units/subunits, special management considerations or protection of the essential features may be required to provide for the growth, reproduction, and sustained function of the habitat on which *Brodiaea filifolia* depends.

The lands proposed as critical habitat represent our best assessment of the habitat that meets the definition of critical habitat for *Brodiaea filifolia* at this time. The essential physical or biological features within the areas proposed as critical habitat may require some level of management to address current and future threats to *B. filifolia*, including the direct and indirect effects of habitat loss and degradation from urban development; the introduction of nonnative invasive plant species; recreational activities; discing and mowing for agricultural practices or fuel modification for fire management; and dumping of manure and sewage sludge.

Loss and degradation of habitat from development was cited in the final listing rule as a primary cause for the decline of *Brodiaea filifolia*. Most of the populations of this species are located in San Diego, Orange, and Riverside Counties. These counties have had (and continue to have) increasing human populations and attendant housing pressure. Natural areas in these counties are frequently near or bounded by urbanized areas. Urban development removes the plant community components and associated clay soils identified in the PCEs, which eliminates or fragments the populations of *B. filifolia*. Grading, discing, and scraping areas in the preparation of areas for urbanization also directly alters the soil surface as well as subsurface soil layers to the degree that they will no longer support plant community types and pollinators associated with *B. filifolia* (PCE 2).

Nonnative invasive plant species may alter the vegetation composition or physical structure identified in the PCEs to an extent that the area does not support *Brodiaea filifolia* or the plant community that it inhabits. Additionally, invasive species may compete with *B. filifolia* for space and resources by depleting water that would otherwise be available to *B. filifolia*.

Unauthorized recreational activities may impact the vegetation composition and soil structure that supports *Brodiaea filifolia* to an extent that the area will no longer have intact soil surfaces or the plant communities identified in the PCEs. Off-highway vehicle (OHV) activity is an example of this type of activity.

Some methods of mowing or discing for agricultural purposes or fuel modification for fire management may preclude the full and natural development of *Brodiaea filifolia* by adversely affecting the PCEs. Mowing may preclude the successful reproduction of the plant, or alter the associated vegetation needed for pollinator activity (PCE 2). Dumping of sewage sludge can cover plants as well as the soils they need. Additionally, this practice can alter the chemistry of the substrate and lead to alterations in the vegetation supported at the site (PCE 1).

In summary, we find that the areas we are proposing as revised critical habitat contain the features essential to the

conservation of *Brodiaea filifolia*, and that these features may require special management considerations or protection. Special management considerations or protection may be required to eliminate, or reduce to negligible level, the threats affecting each unit/subunit and to preserve and maintain the essential features that the proposed critical habitat units/subunits provide to *B. filifolia*. Additional discussions of threats facing individual sites are provided in the individual unit/subunit descriptions.

The designation of critical habitat does not imply that lands outside of critical habitat may not play an important role in the conservation of *Brodiaea filifolia*. In the future, and with changed circumstances, these lands may become essential to the conservation of *B. filifolia*. Activities with a Federal nexus that may affect areas outside of critical habitat, such as development, agricultural activities, and road construction, are still subject to review under section 7 of the Act if they may affect *B. filifolia* because Federal agencies must consider both effects to the plant and effects to critical habitat independently. The prohibitions of section 9 of the Act applicable to *B. filifolia* under 50 CFR 17.71 (e.g., the prohibition against reducing to possession or maliciously damaging or destroying listed plants on Federal lands) also continue to apply both inside and outside of designated critical habitat.

Criteria Used To Identify Critical Habitat

We have determined that all areas we are proposing to designate as revised critical habitat are within the geographical area occupied by *Brodiaea filifolia* at the time of listing (see the ''*Spatial Distribution and Historical Range''* section for more information), and are currently occupied. We considered the areas outside the geographical area occupied by the species at the time of listing, but are not proposing to designate any areas outside the geographical area occupied by *B. filifolia* at the time of listing because we determined that a subset of occupied lands within the species' historical range are adequate to ensure the conservation of *B. filifolia*. Occupied areas exist throughout this species' historical range, and through the conservation of a subset of occupied habitats (35 of 68 extant occurrences, see Table 1), we will be able to stabilize and conserve *B. filifolia* throughout its current and historical range. All units/subunits proposed as critical habitat contain both PCEs in the appropriate quantity and spatial arrangement essential to the conservation of this species and support multiple life-history traits for *B. filifolia*.

As required by section 4(b)(1)(A) of the Act, we use the best scientific and commercial data available in determining areas that contain the features that are essential to the conservation of *Brodiaea filifolia*. The ''*Methods*'' section summarizes the data used for this proposed revised critical habitat. This proposed rule reflects the best available scientific and commercial information and thus differs from our 2005 final critical habitat rule.

This section provides details of the process we used to delineate critical habitat. This proposed rule reflects a progression of conservation efforts for *Brodiaea filifolia*. This progression is based largely on the past analysis of the areas identified as meeting the definition of critical habitat for *B. filifolia* as identified in the 2004 proposed critical habitat rule and the 2005 final critical habitat designation, and new information we obtained on the species' distribution since listing. In some areas that were analyzed in 2005, we have new distribution information that resulted in adding areas to the 2005 critical habitat designation. There are also some areas identified as meeting the definition of critical habitat in the 2005 critical habitat that we did not include in this revision of critical habitat because we determined based on a review of the best available information that they do not meet the definition of critical habitat. The specific differences from the 2005 designation of critical habitat are summarized in the **Summary of Changes From Previously Designated Critical Habitat** section of this rule.

Species and plant communities that are protected across their ranges are expected to have lower likelihoods of extinction (Soule and Simberloff 1986, p. 35; Scott *et al.* 2001, pp. 1297–1300). Genetic variation generally results from the effects of population isolation and adaptation to locally distinct environments (Lesica and Allendorf 1995, pp. 754–757; Fraser 2000, pp. 49–51; Hamrick and Godt 1996, pp. 291–295). We sought to include the range of ecological conditions in which *Brodiaea filifolia* is found to preserve the genetic variation that may reflect adaptation to local environmental conditions, as documented in other plant species (such as in Hamrick and Godt 1996, pp. 299–301; or Millar and Libby 1991, pp. 150, 152–155). A suite of locations that possess unique ecological characteristics will represent more of the environmental variability under which *B. filifolia* has evolved. Protecting these areas will promote the adaptation of the species to different environmental conditions and contribute to species recovery.

We also determined that habitat for pollinators is essential to the survival and recovery of this species because *Brodiaea filifolia* is self-incompatible (genetically similar individuals are not able to produce viable seeds). Sexual reproduction, facilitated through pollination, is necessary for the long-term conservation of this species.

All critical habitat discussed in this proposed revision of critical habitat is occupied by the species at the subunit level meaning that each subunit contains at least one known occurrence of *Brodiaea filifolia*. The essential features in each subunit are necessary for the conservation of the occurrence within the subunit, and the subunit contributes to the overall conservation of the species. Occupied areas were determined from survey data and element occurrence data in the CNDDB (CNDDB 2009, pp. 1–76). Using GIS data in the areas identified as occupied by this species as a guide, we identified the areas that contain the physical and biological features essential to the conservation of *B. filifolia*.

To map the areas that meet the definition of critical habitat, we identified areas that contain the PCEs in the quantity and spatial distribution essential to the conservation of this species using the following criteria: (1) Areas supporting occurrences on rare or unique habitat within the species' range; (2) areas supporting the largest known occurrences of *B. filifolia*; or (3) areas supporting stable occurrences of *B. filifolia* that are likely to be persistent. These criteria are explained in greater detail below and a summary of our analysis of all current and past areas supporting *Brodiaea filifolia* is presented in Table 1.

We have determined that 35 of the 68 extant occurrences meet the definition of critical habitat; of these 35 occurrences, 7 occur on MCB Camp Pendleton and are exempt from critical habitat under section 4(a)(3) of the Act, and 28 occurrences are proposed as critical habitat. Areas containing the PCEs and that meet at least one of the above criteria are considered to contain the physical and biological features essential to the conservation of the species and, therefore, meet the definition of critical habitat. Included in PCE 2 are areas up to 820 ft (250 m) from mapped occurrences of *B. filifolia* to provide adequate space to support the habitat and alternate food sources needed for pollinators of *B. filifolia*. The

820-ft (250-m) distance for determining the pollinator use area is based on a conservative estimate for the mean routine flight distance for ground-nesting solitary bees that pollinate *B. filifolia.* This distance is not meant to capture all habitat that is potentially used by pollinators, but it is meant to capture a sufficient area to allow for pollinators to nest, feed, and reproduce in habitat that is adjacent and connected to the areas were *B. filifolia* grows (see ''*Habitat for Pollinators of Brodiaea filifolia*'' section for a more detailed explanation of pollinator requirements and our derivation of the 820-ft (250-m) distance for determining the pollinator use area).

TABLE 1. SUMMARY OF CRITERIA ANALYSIS OF ALL RECORDED LOCATIONS OF *Brodiaea filifolia*.

''Occurrence number'' and ''Location Description'' are taken from the 5–year review completed in 2009 where more information about each occurrence can be found. Extirpated occurrences were not given an ''Occurrence number'' in the 5–year review.

Occurrence number in 5–year review	Location Description	CNDDB[1] Element Occurrence Number (EO)	Criterion 1: Unique or rare habitat	Criterion 2: Largest occurrences	Criterion 3: Stable and persistent occurrence	Critical Habitat Unit/ Subunit
Los Angeles County, California						
1	Glendora	20	X	—	X	1a
2	San Dimas/Gordon Highlands	40	X	X	—	1b
San Bernardino County, California						
3	Arrowhead Hot Springs	7	X	—	X	2
4	Waterman Canyon	8	—	—	—	N/A
Riverside County, California						
5	San Jacinto Wildlife Area	43 27	X	—	X	11a
6[2]	San Jacinto Ave/Dawson Rd	65	X	—	—	11b
7	Case Road	2	X	X	—	11c
x	Goetz Road	1	—	—	—	extirpated
8	Railroad Canyon	25	—	X	—	11d
9	Upper Salt Creek (Stowe Pool)	26	X	—	—	11e
10	Santa Rosa Plateau - Tenaja Rd.	3	—	—	—	*B. santarosae*
11	Santa Rosa Plateau - North of Tenaja Rd.	31	X	—	—	11h
12	Santa Rosa Plateau - South of Tenaja Rd.	30	X	—	—	11g
13	Santa Rosa Plateau - Mesa de Colorado	5	—	—	—	N/A
14	East of Tenaja Guard Station	29	—	—	—	N/A
15	Redonda Mesa	52	—	—	—	N/A
16[2]	Corona Cala Camino	N/A	—	—	—	N/A
Orange County, California						
17	Edison Viejo	55	—	—	—	N/A
18	Aliso and Woods Canyon Wilderness Park	56	X	X	—	3
19	Cañada Gobernadora /Chiquadora Ridge	64	—	—	X	4c
20[2]	Trampas Canyon	N/A	—	—	—	N/A
21[2]	Middle Gabino	N/A	—	—	—	N/A

TABLE 1. SUMMARY OF CRITERIA ANALYSIS OF ALL RECORDED LOCATIONS OF *Brodiaea filifolia*.—Continued

"Occurrence number" and "Location Description" are taken from the 5–year review completed in 2009 where more information about each occurrence can be found. Extirpated occurrences were not given an "Occurrence number" in the 5–year review.

Occurrence number in 5–year review	Location Description	CNDDB[1] Element Occurrence Number (EO)	Criterion 1: Unique or rare habitat	Criterion 2: Largest occurrences	Criterion 3: Stable and persistent occurrence	Critical Habitat Unit/ Subunit
22	Cristianitos Canyon Cristianitos Canyon/ Lower Gabino Canyon	N/A 62	X	X	—	4g
23[2]	East Talega/Blind Canyon	N/A	—	—	—	N/A
24	Casper's Wilderness Park	24	—	—	X	4b
25	Arroyo Trabuco Golf Course/ Lower Arroyo Trabuco	N/A	—	—	—	N/A
x[2]	Prima Deshecha[4]	61	—	—	—	extirpated
26	Talega/Segunda Deshecha[3]	57	—	—	—	N/A
27	Forster Ranch[3]	58 59 60	—	—	—	N/A
28	Cristianitos Canyon South	63	—	—	—	N/A
San Diego County, California						
29	Miller Mountain	37	—	—	—	*B. santarosae*
	Devil Canyon	39	X	—	X	5b
30	Tributary off of Talega Canyon	N/A	—	—	—	N/A
31[2]	Cristianitos Canyon Pendleton	N/A	—	—	X	exempt
32[2]	San Mateo Creek	N/A	—	—	—	N/A
33	Bravo One	45	—	—	X	exempt
34[1]	Bravo Two North	N/A	—	—	—	N/A
35	Bravo Two South	N/A	—	—	X	exempt
36	Alpha One/Bravo Three	44	—	—	—	N/A
37[2]	Basilone/San Mateo Junction	N/A	—	—	X	exempt
38	Camp Horno	46 47 48 49	—	X	—	exempt
39	Southeast of Horno Summit	50	—	—	—	N/A
40[1]	Top of Las Pulgas Canyon/ Roblar Rd	N/A	—	—	—	N/A
41[2]	Top of Aliso Canyon/Roblar Rd	N/A	—	—	—	N/A
42	Basilone/Roblar Junction	51	—	—	—	N/A
43	East of I-5/South of Las Flores Creek	67 68	—	—	—	N/A
44[2]	Pilgrim Creek	N/A	—	—	X	exempt
45	Pueblitos Canyon	N/A	—	—	—	N/A
46[2]	West of Whelan Lake	N/A	—	—	—	N/A
47[2]	South of French Creek	N/A	—	—	—	N/A

TABLE 1. SUMMARY OF CRITERIA ANALYSIS OF ALL RECORDED LOCATIONS OF *Brodiaea filifolia*.—Continued

"Occurrence number" and "Location Description" are taken from the 5–year review completed in 2009 where more information about each occurrence can be found. Extirpated occurrences were not given an "Occurrence number" in the 5–year review.

Occurrence number in 5–year review	Location Description	CNDDB[1] Element Occurrence Number (EO)	Criterion 1: Unique or rare habitat	Criterion 2: Largest occurrences	Criterion 3: Stable and persistent occurrence	Critical Habitat Unit/ Subunit
48[2]	South White Beach	N/A	—	—	X	exempt
49	Taylor[3] Undeveloped parcel between Darwin properties Darwin Knolls and Darwin Glen	41	—	X	—	6d
50[2]	Arbor Creek/Colucci	N/A	X	—	X	6e
51	Mission View/Sierra Ridge	53	—	—	X	6c
52	Mesa Drive, SDG&E Substation		—	—	X	6b
53	Eternal Hills/Alta Creek Cornerstone Community Church /Oceanside Blvd & El Camino Real	N/A	—	—	X	6a
54[2]	Vista Pacific	N/A	—	—	—	N/A
55[2]	Buena Vista Creek preserve	N/A	—	—	—	N/A
56	Calavera Heights Mitigation Site	N/A	—	—	—	N/A
57	Calavera Hills Village H	23	—	—	X	7c
58[2]	Calavera Hills Village X		—	—	—	N/A
59	Letterbox Canyon - Taylor Made[3]	N/A	—	X	—	7a
	Letterbox Canyon - Salk/Fox-Miller[3]	N/A				
	Letterbox Canyon - Newton Business Center	16				
x	North of Carlsbad dragstrip	14	—	—	—	extirpated
60[2]	Carlsbad Oaks	N/A	—	—	—	N/A
61	Rancho Carrillo	22	—	X	—	7b
	Rancho Santa Fe Rd North		—	—	—	N/A
62	Rancho La Costa	33 34	—	X	—	7d
63	La Costa Town Square	N/A	—	—	—	N/A
	Park View West/La Costa Ave & Rancho Santa Fe Rd[4]	21	—	—	—	extirpated
64	Poinsettia	N/A	—	—	—	N/A
x	Shelley Property/Olivenhein & Rancho Santa Fe Rd junction	32	—	—	—	extirpated
x	Calle Tres Vistas	54	—	—	—	extirpated
x	Vista	15	—	—	—	extirpated
x	Brengle Terrace	18	—	—	—	extirpated

TABLE 1. SUMMARY OF CRITERIA ANALYSIS OF ALL RECORDED LOCATIONS OF *Brodiaea filifolia*.—Continued

"Occurrence number" and "Location Description" are taken from the 5–year review completed in 2009 where more information about each occurrence can be found. Extirpated occurrences were not given an "Occurrence number" in the 5–year review.

Occurrence number in 5–year review	Location Description	CNDDB[1] Element Occurrence Number (EO)	Criterion 1: Unique or rare habitat	Criterion 2: Largest occurrences	Criterion 3: Stable and persistent occurrence	Critical Habitat Unit/ Subunit
x	Vista, east of South Melrose Ave[4]	17	—	—	—	extirpated
x	North of Carlsbad dragstrip	13	—	—	—	extirpated
x	SSE of Buena, near Mission Rd & RR tracks	12	—	—	—	extirpated
65	Rancho Santalina[3]	11	—	X	—	8b
	Loma Alta					
	New Millennium					
	Las Posas Road Extension Project[4]		—	—	—	extirpated
66	Grand Avenue/Las Posas Rd pools[3]	36	X	X	—	8d
	Upham/Pacific St/ Superior Ready Mix	10				
67[2]	Oleander/San Marcos Elementary[3]	N/A	—	X	—	8f
68[2]	Artesian Trails	70	—	—	X	12
		66				
x	4S Ranch[4]	N/A	—	—	—	extirpated

[1] California Department of Fish and Game, Natural Diversity Database
[2] New occurrence since listing, but determined to be occupied at the time of listing
[3] Partially translocated (some plants currently exist at the original location)
[4] Completely translocated (no plants currently exist at the original location)

We identified habitat containing the features essential to the conservation of *Brodiaea filifolia* by using data from the following GIS databases: (1) Species occurrence information in Los Angeles, San Bernardino, Orange, Riverside, and San Diego Counties from the CNDDB and from survey reports; (2) vegetation data layers from Orange, Riverside, and San Diego Counties and vegetation data layers from the U.S. Forest Service's Cleveland National Forest for Los Angeles and San Bernardino Counties; and (3) Natural Resources Conservation Service's Soil Survey Geographic Database (SSURGO) soil data layers for Orange, Riverside, and San Diego Counties, and State Soil Geographic Database (STATSGO) soil data layers for Los Angeles and San Bernardino Counties.

Criteria Used

If occurrences and habitat areas met one or more of the following criteria, they are proposed as critical habitat in this revised critical habitat designation.

(1) The first criterion is any area that supports an occurrence in rare or unique habitat within the species' range. We evaluated all occurrences of *Brodiaea filifolia* under this criterion, regardless of occurrence size. We identified four main factors that constitute rare or unique habitat for *B. filifolia*:

(a) Occurrences in habitat types that are uncommon such as grassland habitat that occurs intermixed with chaparral, grassland habitat that is associated with vernal pools, or large areas of native grassland;

(b) occurrences on uncommon soil types such as clay soils that are altered by hydrothermal activity;

(c) occurrences that grow along ephemeral drainages in seep-type habitats; and

(d) occurrences that grow in gravel, cobbles, and small boulder substrate.

These four unique situations differ from the majority of occurrences of this species, which are found on clay soils intermixed with coastal sage scrub habitat. The conservation of *Brodiaea filifolia* occurring in these rare or unique situations will preserve the diversity of habitats where this species is found.

(2) The second criterion is any area that supports one of the largest known populations of *Brodiaea filifolia*. Occurrences of this species range from just a few plants to several thousand plants, while the majority of the known occurrences are under 3,000 plants (see the **Background** section for a discussion on how occurrences of *B. filifolia* are grouped and counted). However, there are 13 occurrences that stand out as the largest, each having greater than 3,000 plants. Occurrences supporting large numbers of plants (3,000 or more) are noted in Table 1 and are found in the following areas:

(a) Los Angeles County, Subunit 1b-San Dimas;

(b) Riverside County, Subunit 11a-San Jacinto Wildlife Area, Subunit 11c-Case Road, Subunit 11d-Railroad Canyon, Subunit, and 11f-Santa Rosa Plateau — Mesa de Colorado;

(c) Orange County, Unit 3-Aliso and Wood Canyon Wilderness Park, and Subunit 4g-Cristianitos Canyon; and

(d) San Diego County, Subunit 6d-Taylor/Darwin, Subunit 7a-Letterbox Canyon, Subunit 7b-Rancho Carrillo, Subunit 7d-Rancho La Costa, Subunit 8d-Upham, and Subunit 8f-Oleander/San Marcos Elementary (See Table 1).

These large occurrences are present in habitat areas that contain the features essential to the conservation of this species. These areas generally represent large contiguous blocks of intact habitat. The conservation of these large populations will increase the resilience of the species across its range and contribute to the overall recovery of this species.

(3) The third criterion is any area that supports an occurrence considered to be stable and persistent. We consider occurrences that have between 850 and 3,000 flowering stems that have been observed in multiple years to be stable and persistent because we expect these occurrences to have a sufficient amount of corms to sustain the occurrence for a number of years if the habitat remains unaltered. These areas contribute to the conservation of *Brodiaea filifolia* because they provide resilience for the species by minimizing the effects on the species from the loss of any single occurrence, and the conservation of these areas helps to maintain the diversity of habitat where this species occurs. The conservation of these areas allows *B. filifolia* to maintain its current geographic distribution. The conservation of stable and persistent occurrences throughout the species' range helps to maintain connectivity between occurrences that are in proximity to one another and maintain potential gene flow. This is particularly important for *B. filifolia* because this species relies on outcrossing for successful reproduction.

To determine which areas met this criterion, we identified occurrences with counts of between 850 and 3,000 flowering stalks that had been observed in multiple years. Additionally, we looked at all occurrences with fewer than 850 flowering stalks to determine if any of these exhibited the same persistence and stability characteristics to provide similar conservation value as the other identified occurrences with greater than 850 flowering stalks (since the counts for an occurrence vary from year to year). We found that one occurrence with fewer than 850 flowering stalks (at the Arbor Creek/Colucci site) exhibited characteristics of a stable, persistent occurrence (i.e., consistent size not substantially different than 850 flowering stalks); therefore, this occurrence fulfills the ecological role of sites we are interested in identifying through this criterion, even though the high count at this site is 620 flowering stalks.

Of the 68 occurrences of *Brodiaea filifolia* that we identified as being extant in our 5–year review for this species, 35 occurrences meet one or more of the three criteria outlined above. Seven of these 35 occurrences are exempt from critical habitat under section 4(a)(3) of the Act (see ''**Exemptions Under Section 4(a)(3) of the Act**''), the remaining 28 occurrences are proposed as revised critical habitat. Thirteen occurrences, of the 28 proposed occurrences, fit into one of the four reasons that areas meet the ''rare or unique habitat'' criterion; 13 occurrences meet the ''largest occurrences'' criterion; and 11 occurrences meet the ''stable and persistent occurrences'' criterion. These occurrences represent the historical range of the species and are adequate to provide for this species' conservation. Occurrences not identified in this process may still be important to the conservation of this species, but without the conservation of the occurrences identified through this process, the recovery effort for this species may be impaired.

Other Factors Involved With Delineating Critical Habitat

Following the identification of 35 occurrences of the 68 extant occurrences that met one of the 3 criteria listed above, we mapped the area that contained the PCEs at each occurrence including the areas out up to 820 ft (250 m) of mapped occurrences of *Brodiaea filifolia* to provide adequate space to support the habitat and alternate food sources needed for pollinators of *B. filifolia* (see ''*Habitat for Pollinators of Brodiaea filifolia*'' section).

Areas that did not provide habitat for *Brodiaea filifolia* or potential pollinators were removed from the 820-ft (250-m) zone of mapped occurrences of *B. filifolia*, such as areas that were developed or severely altered by grading. Our mapping methodology captures the PCEs in the appropriate quantity and spatial arrangement essential to the conservation of the species, and encompasses the range of environmental variability for this species. Although a genetic analysis of *B. filifolia* has not been conducted, these criteria likely capture the full breadth of important habitat types and are expected to protect the genetic variability of this species. The resulting 35 areas constitute the areas we have determined contain the physical and biological features essential to the conservation of *B. filifolia* and meet the definition of critical habitat. Seven of the 35 areas are on MCB Camp Pendleton and are exempt from this proposed revised rule under section 4(a)(3) of the Act; the other 28 areas were mapped as the proposed revised critical habitat for *B. filifolia*, and are described in this document.

When determining the proposed revised critical habitat boundaries, we made every effort to map precisely only the areas that contain the PCEs and provide for the conservation of *Brodiaea filifolia*. However, we cannot guarantee that every fraction of proposed revised critical habitat contains the PCEs due to the mapping scale that we use to draft critical habitat boundaries. Additionally, we made every attempt to avoid including developed areas such as lands underlying buildings, pavement, and other structures because such lands lack PCEs for *B. filifolia*. The scale of the maps we prepared under the parameters for publication within the Code of Federal Regulations may not reflect the exclusion of such developed lands. Any such lands inadvertently left inside critical habitat boundaries shown on the maps of this proposed revised critical habitat are excluded by text in this rule and are not proposed for critical habitat designation. Therefore, Federal actions involving these lands would not trigger section 7 consultation with respect to critical habitat and the requirement of no adverse modification, unless the specific actions may affect adjacent critical habitat.

Summary of Changes From Previously Designated Critical Habitat

The areas identified in this rule constitute a proposed revision from the areas we designated as critical habitat for *Brodiaea filifolia* on December 13, 2005 (70 FR 73820). In cases where we have new information or information that was not available for the previous designation, we made changes to the critical habitat for *B. filifolia* to ensure that this rule reflects the best scientific data available. We made changes to the PCEs and our criteria used to identify critical habitat. We incorporated information related to the taxonomy of the species including the change in plant family for *B. filifolia*. We redefined the boundaries of each subunit proposed as critical habitat to more accurately reflect the areas that include the features that are essential to the conservation of *B. filifolia,* and we analyzed new distribution data that has become available to us following the 2005 designation. The Secretary is also considering whether to exercise his

discretion to exclude specific areas from the final designation under section 4(b)(2) of the Act, including reconsidering areas excluded in the prior designation, and we are seeking public comment (see **Public Comments** section of this rule). Table 2 shows the progression of each subunit of critical habitat from the 2004 proposed critical habitat to this proposed revised critical habitat. Table 3 includes name changes that we made for some of the subunits where the old names were ambiguous or do not reflect the current name used to refer to these areas; although the names of these units changed, the locations have not changed. Following Tables 2 and 3, we provide a detailed description of each change made in this proposed revised rule and point to new information that precipitated the change.

TABLE 2. SIZE AND EVALUATION OF UNITS AND SUBUNITS FOR *Brodiaea filifolia* IN 2004 PROPOSED CRITICAL HABITAT (PCH)

2005 final critical habitat (fCH), and 2009 proposed revised critical habitat (prCH), and a comparison of the area considered to meet the definition of critical habitat between the 2005 fCH and 2009 prCH.

Unit/Subunit Number and Name	2004 pCH	2005 fCH	2009 prCH	Change from fCH to prCH
Unit 1: Los Angeles County				
1a. Glendora	96 ac (39 ha)	96 ac (39 ha)	67 ac (27 ha)	(-) 29 ac (12 ha)
1b. San Dimas	198 ac (80 ha)	198 ac (80 ha)	138 ac (56 ha)	(-) 60 ac (24 ha)
Unit 2: San Bernardino County				
2. Arrowhead Hot Springs	89 ac (36 ha)	Not designated, wrong location	61 ac (25 ha)	(+) 61 ac (25 ha)
Unit 3: Central Orange County				
3. Aliso Canyon	151 ac (61ha)	Not designated, did not meet the definition of critical habitat	113 ac (46 ha)	(+) 113 ac (46 ha)
Unit 4: Southern Orange County				
4a. Arroyo Trabuco	74 ac (30 ha)	Not designated, did not meet the definition of critical habitat	N/A	no change
4b. Caspers Wilderness Park	259 ac (105 ha)	259 ac (105 ha); Excluded under section 4(b)(2)	205 ac (83 ha)	(-) 54 ac (22 ha)
4c. Cañada Gobernadora/ Chiquita Ridgeline	311 ac (126 ha)	311 ac (126 ha); Excluded under section 4(b)(2)	133 ac (54 ha)	(-) 178 ac (72 ha)
4d. Prima Deschecha	119 ac (48 ha)	Not designated, did not meet the definition of critical habitat	N/A	no change
4e. Forster Ranch	96 ac (39 ha)	Not designated, did not meet the definition of critical habitat	N/A	no change
4f. Talega/Segunda Deshecha	190 ac (77 ha)	Not designated, did not meet the definition of critical habitat	N/A	no change
4g. Cristianitos Canyon	588 ac (238 ha)	588 ac (238 ha); Excluded under section 4(b)(2)	587 ac (238 ha)	(-) 1ac (0.4 ha)
4h. Cristianitos Canyon South	72 ac (29 ha)	Not designated, did not meet the definition of critical habitat	N/A	no change
4i. Blind Canyon	151 ac (61 ha)	Not designated, did not meet the definition of critical habitat	N/A	no change
Unit 5: Northern San Diego County				
5a. Miller Mountain	1,263 ac (511 ha)	Not designated, mostly hybrid plants	Not proposed, only *Brodiaea santarosae* present	no change

TABLE 2. SIZE AND EVALUATION OF UNITS AND SUBUNITS FOR *Brodiaea filifolia* IN 2004 PROPOSED CRITICAL HABITAT (PCH)—Continued

2005 final critical habitat (fCH), and 2009 proposed revised critical habitat (prCH), and a comparison of the area considered to meet the definition of critical habitat between the 2005 fCH and 2009 prCH.

Unit/Subunit Number and Name	2004 pCH	2005 fCH	2009 prCH	Change from fCH to prCH
5b. Devil Canyon	264 ac (107ha)	249 ac (101 ha)	274 ac (111 ha)	(+) 25 ac (10 ha)
Unit 6: Oceanside				
6a. Alta Creek	49 ac (20 ha)	Not designated, did not meet the definition of critical habitat	72 ac (29 ha)	(+) 72 ac (29 ha)
6b. Mesa Drive	5 ac (2 ha)	5 ac (2 ha); Excluded under section 4(b)(2)	17 ac (7 ha)	(+) 12 ac (5 ha)
6c. Oceanside East/ Mission Avenue	64 ac (26 ha)	Not designated, did not meet the definition of critical habitat	12 ac (5 ha)	(+) 12 ac (5 ha)
6d. Taylor/Darwin	80 ac (32 ha)	36 ac (15 ha); Excluded under section 4(b)(2)	35 ac (14 ha)	(-) 45 ac (18 ha)
6e. Arbor Creek	N/A	N/A	94 ac (38 ha)	(+) 94 ac (38 ha)
Unit 7: Carlsbad				
7a. Fox-Miller (Letterbox Canyon)	93 ac (38 ha)	93 ac (38 ha); Excluded under section 4(b)(2)	57 ac (23 ha)	(-) 36 ac (15 ha)
7b. Rancho Carrillo	32 ac (13 ha); Excluded under section 4(b)(2)	Not designated, did not meet the definition of critical habitat	37 ac (15 ha)	(+) 37 ac (15 ha)
7c. Calvera Hills	84 ac (34 ha); Excluded under section 4(b)(2)	84 ac (34 ha); Excluded under section 4(b)(2)	71 ac (29 ha)	(-) 13 ac (5 ha)
7d. Villages of La Costa (Rancho La Costa)	208 ac (84 ha); Excluded under section 4(b)(2)	208 ac (84 ha); Excluded under section 4(b)(2)	98 ac (40 ha)	(-) 110 ac (45 ha)
Carlsbad Oaks	113 ac (46 ha); Excluded under section 4(b)(2)	113 ac (46 ha); Excluded under section 4(b)(2)	Not proposed, does not meet the definition of critical habitat	(-) 113 ac (46 ha)
Carlsbad Highlands	70 ac (29 ha); Excluded under section 4(b)(2)	70 ac (29 ha); Excluded under section 4(b)(2)	Not proposed, does not meet the definition of critical habitat	(-) 70 ac (29 ha)
Poinsettia	54 ac (22 ha); Excluded under section 4(b)(2)	54 ac (22 ha); Excluded under section 4(b)(2)	Not proposed, does not meet the definition of critical habitat	(-) 54 ac (22 ha)
Unit 8: San Marcos and Vista				
8a. Rancho Santa Fe Road North	86 ac (35 ha)	Not designated, did not meet the definition of critical habitat	N/A	no change
8b. Rancho Santalina/ Loma Alta	82 ac (33 ha)	Not included under section 3(5)(a)	47 ac (19 ha)	(+) 47 ac (19 ha)
8c. Grand Avenue	10 ac (4 ha)	Not designated, did not meet the definition of critical habitat	N/A	no change
8d. Upham	117 ac (47 ha)	54 ac (22 ha)	54 ac (22 ha)	no change
8e. Linda Vista	20 ac (8 ha)	Not designated, did not meet the definition of critical habitat	N/A	no change
8f. Oleander/San Marcos Elementary	N/A	N/A	7 ac (3 ha)	(+) 7 ac (3 ha)

TABLE 2. SIZE AND EVALUATION OF UNITS AND SUBUNITS FOR *Brodiaea filifolia* IN 2004 PROPOSED CRITICAL HABITAT (PCH)—Continued

2005 final critical habitat (fCH), and 2009 proposed revised critical habitat (prCH), and a comparison of the area considered to meet the definition of critical habitat between the 2005 fCH and 2009 prCH.

Unit/Subunit Number and Name	2004 pCH	2005 fCH	2009 prCH	Change from fCH to prCH
Unit 9				
9. Double LL Ranch	57 ac (23 ha)	Not designated, did not meet the definition of critical habitat	N/A	no change
Unit 10				
10. Highland Valley	74 ac (30 ha)	Not designated, did not meet the definition of critical habitat	N/A	no change
Unit 11: Western Riverside County				
11a. San Jacinto Wildlife Area	512 ac (207 ha); Excluded under section 4(b)(2)	512 ac (207 ha); Excluded under section 4(b)(2)	401 ac (162 ha)	(-) 110 ac (45 ha)
11b. San Jacinto Avenue/ Dawson Road	168 ac (68 ha); Excluded under section 4(b)(2)	168 ac (68 ha); Excluded under section 4(b)(2)	117 ac (47 ha)	(-) 51 ac (21 ha)
11c. Case Road	373 ac (151 ha); Excluded under section 4(b)(2)	373 ac (151 ha); Excluded under section 4(b)(2)	180 ac (73 ha)	(-) 193 ac (78 ha)
11d. Railroad Canyon	432 ac (175 ha); Excluded under section 4(b)(2)	432 ac (175 ha); Excluded under section 4(b)(2)	257 ac (104 ha)	(-) 175 ac (71 ha)
11e. Upper Salt Creek (Stowe Pool)	131 ac (53 ha); Excluded under section 4(b)(2)	131 ac (53 ha); Excluded under section 4(b)(2)	145 ac (59 ha)	(+) 14 ac (6 ha)
11f. Santa Rosa Plateau — Mesa de Colorado	519 ac (210 ha); Excluded under section 4(b)(2)	519 ac (210 ha); Excluded under section 4(b)(2)	234 ac (95 ha)	(-) 285 ac (115 ha)
Santa Rosa Plateau — Tenaja Rd.	304 ac (123 ha); Excluded under section 4(b)(2)	304 ac (123 ha); Excluded under section 4(b)(2)	Not proposed; only *Brodiaea santarosae* present	(-) 304 ac (123 ha)
11g. Santa Rosa Plateau — South of Tenaja Rd.	218 ac (88 ha); Excluded under section 4(b)(2)	218 ac (88 ha); Excluded under section 4(b)(2)	117 ac (47 ha)	(-) 101 ac (41 ha)
11h. Santa Rosa Plateau — North of Tenaja Rd.	111 ac (45 ha); Excluded under section 4(b)(2)	111 ac (45 ha); Excluded under section 4(b)(2)	44 ac (18 ha)	(-) 67 ac (27 ha)
East of Tenaja Guard Station	218 ac (88 ha); Excluded under section 4(b)(2)	218 ac (88 ha); Excluded under section 4(b)(2)	Not proposed, does not meet the definition of critical habitat	(-) 218 ac (88 ha)
N. End Redondo Mesa	77 ac (31 ha); Excluded under section 4(b)(2)	77 ac (31 ha); Excluded under section 4(b)(2)	Not proposed, does not meet the definition of critical habitat	(-) 77 ac (31 ha)
Corona (north)	74 ac (30 ha); Excluded under section 4(b)(2)	Not designated, did not meet the definition of critical habitat	N/A	no change
Corona (south)	67 ac (27 ha); Excluded under section 4(b)(2)	Not designated, did not meet the definition of critical habitat	N/A	no change
Moreno Valley	64 ac (26 ha); Excluded under section 4(b)(2)	Not designated, did not meet the definition of critical habitat	N/A	no change
Unit 12: Central San Diego County - Artesian Trails				
12. Artesian Trails	N/A	N/A	109 ac (44 ha)	(+) 109 ac (44 ha)

TABLE 2. SIZE AND EVALUATION OF UNITS AND SUBUNITS FOR *Brodiaea filifolia* IN 2004 PROPOSED CRITICAL HABITAT (PCH)—Continued

2005 final critical habitat (fCH), and 2009 proposed revised critical habitat (prCH), and a comparison of the area considered to meet the definition of critical habitat between the 2005 fCH and 2009 prCH.

Unit/Subunit Number and Name	2004 pCH	2005 fCH	2009 prCH	Change from fCH to prCH
TOTAL FOR NON-MILITARY LANDS	**8,486 ac (3,434 ha)**	**5,480 ac (2,218 ha)**	**3,786 ac (1,532 ha)**	**(-) 1,695 ac (686 ha)**
MCB Camp Pendleton				
Cristianitos Canyon Pendleton	N/A	N/A	190 ac (77 ha); 4(a)(3) exemption	(+) 190 ac (77 ha)
Bravo One	121 ac (41 ha); Excluded under section 4(b)(2)	121 ac (41 ha); 4(a)(3) exemption	143 ac (58 ha); 4(a)(3) exemption	(+) 22 ac (9 ha)
Bravo Two South	N/A	N/A	269 ac (109 ha); 4(a)(3) exemption	(+) 269 ac (109 ha)
Alpha One/Bravo Three	114 ac (46 ha); Excluded under section 4(b)(2)	114 ac (46 ha); 4(a)(3) exemption	Does not meet the definition of critical habitat	(-) 114 ac (46 ha)
Basilone/San Mateo Junction	N/A	N/A	163 ac (66 ha); 4(a)(3) exemption	(+) 163 ac (66 ha)
Camp Horno	452 ac (183 ha); Excluded under section 4(b)(2)	452 ac (183 ha); 4(a)(3) exemption	339 ac (137 ha); 4(a)(3) exemption	(-) 113 ac (46 ha)
SE Horno Summit	116 ac (47 ha); Excluded under section 4(b)(2)	116 ac (47 ha); 4(a)(3) exemption	Does not meet the definition of critical habitat	(-) 116 ac (47 ha)
Kilo One	114 ac (46 ha); Excluded under section 4(b)(2)	114 ac (46 ha); 4(a)(3) exemption	Does not meet the definition of critical habitat	(-) 114 ac (46 ha)
Pilgrim Creek	N/A	N/A	368 ac (149 ha); 4(a)(3) exemption	(+) 368 ac (149 ha)
South White Beach	N/A	N/A	59 ac (24 ha); 4(a)(3) exemption	(+) 59 ac (24 ha)
TOTAL FOR MILITARY LANDS[3]	**917 ac (371 ha)**	**917 ac (371 ha); 4(a)(3) exemption**	**1,531 ac (620 ha)**	**(+) 614 ac (249 ha)**
TOTAL AREA THAT MEETS (or MET) THE DEFINITION OF CRITICAL HABITAT	**9,403 ac (3,805 ha)**	**6,397 ac (2,589 ha)**	**5,317 ac (2,152 ha)**	**(-) 1,080 ac (438 ha)**

[1]This table does not include all locations that are occupied by *Brodiaea filifolia*. It includes only those locations that have met the definition of critical habitat in this or one of the past proposed or final critical habitat rules for *B. filifolia*.
[2]Values in this table may not sum due to rounding.
[3]Military Lands are exempt from this rule under section 4(a)(3) of the Act.

TABLE 3. NAME CHANGES FROM PREVIOUS CRITICAL HABITAT TO THIS PROPOSED REVISED CRITICAL HABITAT.

Subunit number	Previous name	Current name	Reason for change
6c	Oceanside East/Mission Ave	Mission View/Sierra Ridge	Not the eastern most occurrence in Oceanside
7a	Fox-Miller	Letterbox Canyon	Includes more properties that just Fox-Miller
7c	Calavera Heights	Calavera Hills Village H	New name is more specific
11b	San Jacinto Floodplain	San Jacinto Avenue/Dawson Road	New name is more specific
11c	Case Road Area	Case Road	New name is more specific

(1) We refined the PCEs to more accurately define the physical and biological features that are essential to the conservation of *Brodiaea filifolia*. We added a new part under PCE 1 (PCE 1B) to more clearly define the soils where *B. filifolia* occurs in San Bernardino County. We added information to PCE 2 to indicate that land out up to 820 ft (250 m) from mapped occurrences contains the physical and biological features essential to the conservation of *B. filifolia* because that area provides habitat for insect species that pollinate *B. filifolia* and allow this species to sexually reproduce. This information was discussed in the 2005 final critical habitat; however, it was not specifically included in the PCEs.

(2) We revised the criteria used to identify critical habitat. We started by using the basic criteria used in the 2005 final critical habitat designation. However, in this proposed revised critical habitat we gathered new data available since the publication of the 2005 rule and reevaluated all of the *Brodiaea filifolia* data available to ensure that this proposed rule reflected the best available science. With the additional data and our reevaluation of the available data, some of our conclusions were different than those we made in the 2005 critical habitat designation. As a result, some areas identified as meeting the definition of critical habitat in the 2005 designation are not included in this proposed rule (such as areas on Santa Rosa Plateau that support *B. santarosae* instead of *B. filifolia* and areas in the City of Carlsbad that contain smaller occurrences of *B. filifolia* that did not meet any of our three criteria), and other areas were included in this proposed rule that were not identified as meeting the definition of critical habitat in the 2005 designation (such as areas in existence at the time of listing, but not evaluated or included due to lack of surveys for *B. filifolia*). We described the steps that we used to identify and delineate the areas that we are proposing as critical habitat in more detail compared to the 2005 critical habitat designation to ensure that the public better understands why the areas are being proposed as critical habitat.

(3) We improved our mapping methodology to more accurately define those areas that possess the physical and biological features essential to the conservation of the species and to more precisely draw critical habitat boundaries. This proposed revised rule identifies 1,695 (686 ha) considered to contain the features essential to the conservation of *Brodiaea filifolia* less than we identified in the 2005 rule (this calculation does not include the changes made on military lands exempt under section 4(a)(3) of the Act, see Table 2). This reduction is primarily due to our attempt to better represent the areas that contain the physical and biological features essential to the conservation of *B. filifolia*. In the 2005 final rule, we used a 100-meter grid resolution to delineate critical habitat. In this proposed revised rule, we did not use the 100-meter grid mapping methodology. Instead we directly mapped the areas containing the PCEs. We believe the result is a more precise mapping of the proposed critical habitat. However, we acknowledge that there still may be some areas mapped as critical habitat that do not contain the PCEs due to mapping, data, and resource constraints.

(4) In the 2005 rule, we excluded subunits under section 4(b)(2) of the Act within the planning boundaries for: (a) The Orange County Southern Subregion HCP, (b) the draft City of Oceanside Subarea Plan and the City of Carlsbad's HMP under the MHCP, (c) the Villages of La Costa HCP, and (d) the Western Riverside County MSHCP (see Table 2 for the specific subunits excluded). In this proposed revised critical habitat rule, we identified several areas we are considering for exclusion under section 4(b)(2) of the Act, as follows: (a) The Orange County Southern Subregion HCP, (b) the City of Carlsbad's HMP under the MHCP (which includes the Villages of La Costa Habitat Conservation Plan), (c) the Western Riverside County MSHCP, and (d) the City and County of San Diego Subarea Plans under the MSCP (see the **Areas Considered for Exclusion Under Section 4(b)(2) of the Act** section). The Villages of La Costa HCP is included within (considered part of) the City of Carlsbad's HMP under the MHCP; therefore, all proposed critical habitat that overlaps with the Villages of La Costa HCP is being considered for exclusion under the City of Carlsbad's HMP. We are currently not considering the exclusion of critical habitat within the area covered by the draft City of Oceanside Subarea Plan (which was excluded previously). The exclusions in the final revised critical habitat designation could differ from the exclusions we made in the 2005 final critical habitat designation.

(5) New information resulted in additional areas being identified as meeting the definition of critical habitat for *Brodiaea filifolia*. First, we added two areas that are newly discovered to support occurrences of *B. filifolia*; however, we believe that these areas were occupied at the time of listing (Subunit 8f and Unit 12). Second, we have new information on four areas containing substantial occurrences that were proposed as critical habitat in 2004 but not designated in the 2005 final rule because at that time the data did not indicate these areas were substantial occurrences (Unit 3 and Subunits 6a, 6c, and 7b). We now have information, mostly in the form of updated surveys, indicating that these areas contain substantial occurrences of *B. filifolia* and meet the definition of critical habitat (see Criteria 2 above under the ''*Criteria Used To Identify Critical Habitat*'' section). Third, we added two areas where the previously identified subunits were placed in the wrong locations and did not contain the actual occurrences of *B. filifolia* that they were intended to contain (Unit 2 and Subunit 11e); we have now identified and mapped the correct areas. Fourth, we added land to seven proposed subunits where new survey data indicated these lands contain the physical and biological features essential to the conservation of *B. filifolia* (Subunits 4g, 5b, 6a, 6b, 7a, 11a, and 11f).

(6) New information also resulted in the removal of areas previously identified as meeting the definition of critical habitat for *Brodiaea filifolia*. First, ten areas identified as meeting the definition of critical habitat in the 2004 proposed rule are not proposed in this revision of critical habitat. The best available scientific and commercial data indicates that these occurrences do not meet the criteria in this proposed rule to identify areas containing the essential physical and biological features (Carlsbad Oaks, Carlsbad Highlands, Poinsettia, East of Tenaja Guard Station, North end of Redondo Mesa, three areas on Marine Corps Base Camp Pendleton, Unit 9/Double LL Ranch, and Unit 10/Highland Valley). Second, we are not proposing two areas where the new species of *Brodiaea, B. santarosae,* was found and no *B. filifolia* was found (Santa Rosa Plateau — Tenaja Rd. and Subunit 5a/Miller Mountain). These areas were thought to contain both pure *B. filifolia* and hybrid *B. filifolia* in the past; however, current data indicates that these areas only contain *B. santarosae*. Third, in 14 proposed subunits we are not proposing specific areas that previously (in the 2005 rule) met the definition of critical habitat because these specific areas do not contain the physical and biological features essential to the conservation of *B. filifolia* (portions of Subunits 1a, 1b, 4b, 4c, 4g, 6c, 6d, 7c, 7d, 11a, 11b, 11c, 11d, and 11f). More information about

the units and subunits that contain the physical and biological features essential to the conservation of *B. filifolia* and are proposed as revised critical habitat are described in greater detail in the **Proposed Revised Critical Habitat Designation** section.

Proposed Revised Critical Habitat Designation

We are proposing 3,786 ac (1,532 ha) in 10 units, subdivided into 28 subunits as revised critical habitat for *Brodiaea filifolia*. The unit numbers in this proposed rule correspond to those used in the 2004 proposed rule and the 2005 final rule; however, Units 9 and 10 are not proposed and Units 11 and 12 are new to this proposed rule. Unit 11 represents lands in Riverside County excluded from the 2005 designation of critical habitat and Unit 12 represents the Artesian Trails area in San Diego County that is now included based on new data on occurrences in this area. To minimize confusion with the previous proposal and designation we are not using Unit numbers 9 and 10 in this rule (see Table 2 and **Summary of Changes From Previously Designated Critical Habitat** section).

The areas we describe below constitute our best assessment at this time of areas that meet the definition of critical habitat for *Brodiaea filifolia*. These areas constitute our best assessment of areas determined to be within the geographical area occupied at the time of listing that contain the physical and biological features essential to the conservation of *B. filifolia* that may require special management considerations or protection. We are not proposing any areas outside the geographical area occupied by the species at the time of listing because we determined that the lands we are proposing as critical habitat are adequate to ensure conservation of *B. filifolia*. The lands proposed as revised critical habitat represent a subset of the total lands occupied by *B. filifolia*. Table 4 identifies the approximate area of each proposed critical habitat subunit by land ownership. These subunits, which generally correspond to the geographic area of the subunits delineated in the 2005 designation (see Table 2 for a detailed comparison of this proposed rule and the 2005 designation), if finalized, will replace the current critical habitat designation for *B. filifolia* in 50 CFR 17.96(a).

TABLE 4. AREA ESTIMATES IN ACRES (AC) AND HECTARES (HA), AND LAND OWNERSHIP FOR *Brodiaea filifolia* PROPOSED REVISED CRITICAL HABITAT.

Location	Ownership				Total Area[2]
	Federal	State Government	Local Government	Private	
Unit 1: Los Angeles County					
1a. Glendora	0 ac (0 ha)	0 ac (0 ha)	0 ac (0 ha)	67 ac (27 ha)	67 ac (27 ha)
1b. San Dimas	13 ac (5 ha)	0 ac (0 ha)	0 ac (0 ha)	125 ac (51 ha)	138 ac (56 ha)
Unit 2: San Bernardino County					
2. Arrowhead Hot Springs	0 ac (0 ha)	0 ac (0 ha)	0 ac (0 ha)	61 ac (25 ha)	61 ac (25 ha)
Unit 3: Central Orange County					
3. Aliso Canyon	0 ac (0 ha)	0 ac (0 ha)	113 ac (46 ha)	0 ac (0 ha)	113 ac (46 ha)
Unit 4: Southern Orange County					
4b. Caspers Wilderness Park	0 ac (0 ha)	0 ac (0 ha)	185 ac (75 ha)	20 ac (8 ha)	205 ac (83 ha)
4c. Cañada Gobernadora/ Chiquita Ridgeline	0 ac (0 ha)	0 ac (0 ha)	0 ac (0 ha)	133 ac (54 ha)	133 ac (54 ha)
4g. Cristianitos Canyon	0 ac (0 ha)	0 ac (0 ha)	0 ac (0 ha)	587 ac (238 ha)	587 ac (238 ha)
Unit 5: Northern San Diego County					
5b. Devil Canyon	266 ac (108 ha)	0 ac (0 ha)	0 ac (0 ha)	8 ac (3 ha)	274 ac (111ha)
Unit 6: Oceanside					
6a. Alta Creek	0 ac (0 ha)	0 ac (0 ha)	0 ac (0 ha)	72 ac (29 ha)	72 ac (29 ha)
6b. Mesa Drive	0 ac (0 ha)	0 ac (0 ha)	0 ac (0 ha)	17 ac (7 ha)	17 ac (7 ha)
6c. Mission View/ Sierra Ridge	0 ac (0 ha)	0 ac (0 ha)	0 ac (0 ha)	12 ac (5 ha)	12 ac (5 ha)
6d. Taylor/Darwin	0 ac (0 ha)	0 ac (0 ha)	0 ac (0 ha)	35 ac (14 ha)	35 ac (14 ha)
6e. Arbor Creek	0 ac (0 ha)	0 ac (0 ha)	0 ac (0 ha)	94 ac (38 ha)	94 ac (38 ha)

TABLE 4. AREA ESTIMATES IN ACRES (AC) AND HECTARES (HA), AND LAND OWNERSHIP FOR *Brodiaea filifolia* PROPOSED REVISED CRITICAL HABITAT.—Continued

Location	Ownership				Total Area[2]
	Federal	State Government	Local Government	Private	
Unit 7: Carlsbad					
7a. Letterbox Canyon	0 ac (0 ha)	0 ac (0 ha)	0 ac (0 ha)	57 ac (23 ha)	57 ac (23 ha)
7b. Rancho Carrillo	0 ac (0 ha)	0 ac (0 ha)	0 ac (0 ha)	37 ac (15 ha)	37 ac (15 ha)
7c. Calavera Hills Village H	0 ac (0 ha)	0 ac (0 ha)	0 ac (0 ha)	71 ac (29 ha)	71 ac (29 ha)
7d. Rancho La Costa	0 ac (0 ha)	0 ac (0 ha)	0 ac (0 ha)	98 ac (40 ha)	98 ac (40 ha)
Unit 8: San Marcos and Vista					
8b. Rancho Santalina/ Loma Alta	0 ac (0 ha)	0 ac (0 ha)	0 ac (0 ha)	47 ac (19 ha)	47 ac (19 ha)
8d. Upham	0 ac (0 ha)	0 ac (0 ha)	0 ac (0 ha)	54 ac (22 ha)	54 ac (22 ha)
8f. Oleander/San Marcos	0 ac (0 ha)	0 ac (0 ha)	0 ac (0 ha)	7 ac (3 ha)	7 ac (3 ha)
Unit 9: Double LL Ranch - No longer proposed					
Unit 10: Highland Valley - No longer proposed					
Unit 11: Western Riverside County					
11a. San Jacinto Wildlife Area	0 ac (0 ha)	385 ac (156 ha)	0 ac (0 ha)	16 ac (6 ha)	401 ac (162 ha)
11b. San Jacinto Avenue/ Dawson Road	0 ac (0 ha)	0 ac (0 ha)	0 ac (0 ha)	117 ac (47 ha)	117 ac (47 ha)
11c. Case Road	0 ac (0 ha)	0 ac (0 ha)	0 ac (0 ha)	180 ac (73 ha)	180 ac (73 ha)
11d. Railroad Canyon	53 ac (21 ha)	0 ac (0 ha)	0 ac (0 ha)	205 ac (83 ha)	257 ac (104 ha)
11e. Upper Salt Creek (Stowe Pool)	0 ac (0 ha)	0 ac (0 ha)	0 ac (0 ha)	145 ac (59 ha)	145 ac (59 ha)
11f. Santa Rosa Plateau – Mesa de Colorado	0 ac (0 ha)	221 ac (89 ha)	5 ac (2 ha)	8 ac (3 ha)	234 ac (95 ha)
11g. Santa Rosa Plateau – South of Tenaja Road	0 ac (0 ha)	117 ac (47 ha)	0 ac (0 ha)	0 ac (0 ha)	117 ac (47 ha)
11h. Santa Rosa Plateau – North of Tenaja Road	0 ac (0 ha)	44 ac (18 ha)	0 ac (0 ha)	0 ac (0 ha)	44 ac (18 ha)
Unit 12: Central San Diego County - Artesian Trails					
12. Artesian Trails	0 ac (0 ha)	0 ac (0 ha)	0 ac (0 ha)	109 ac (44 ha)	109 ac (44 ha)
Total[2]	332 ac (134 ha)	766 ac (310 ha)	303 ac (123 ha)	2,385 ac (965 ha)	3,786 ac (1,532 ha)

[1] 1,531 ac (620 ha) of federally owned land on MCB Camp Pendleton is exempt from this critical habitat (see EXEMPTIONS UNDER SECTION 4(A)(3) OF THE ACT section).
[2] Values in this table may not sum due to rounding.

Presented below are brief descriptions of all subunits and reasons why they meet the definition of critical habitat for *Brodiaea filifolia*. The subunits are listed in order geographically north to south and west to east.

Unit 1: Los Angeles County

Unit 1 is located in Los Angeles County and consists of two subunits totaling 206 ac (83 ha). This unit contains 13 ac (5 ha) of federally owned land and 192 ac (78 ha) of private land.

Subunit 1a: Glendora

Subunit 1a consists of 67 ac (27 ha) of private land in the City of Glendora,

in the foothills of the San Gabriel Mountains in Los Angeles County. Lands within this subunit contain Cieneba-Exchequer-Sobrante soils, a type of silty loam, and consist primarily of northern mixed chaparral and coastal sage scrub habitat. Subunit 1a contains the physical and biological features essential to the conservation of *Brodiaea filifolia* because it (1) contains the PCEs for *B. filifolia*, including sandy loam soils (PCE 1E) and areas with a natural, generally intact surface and subsurface soil structure that support *B. filifolia* and pollinator habitat (PCE 2); (2) supports a rare or unique occurrence, representing one of two occurrences located in the foothills of the San Gabriel Mountains part of the Transverse Ranges where the species was historically found; and (3) supports a stable, persistent occurrence. The site is owned and managed by the Glendora Community Conservancy (GCC). The GCC has expressed interest in creating a management plan for their land; however, the plan has not been completed at this time. The physical and biological features essential to the conservation of the species in this subunit may require special management considerations or protection to address threats from nonnative invasive plants. Please see the ''Special Management Considerations or Protection'' section of this proposed rule for a discussion of the threats to *B. filifolia* habitat and potential management considerations.

Subunit 1b: San Dimas

Subunit 1b consists of 13 ac (5 ha) Federal land (Angeles National Forest) and 125 ac (51 ha) of private land near the City of San Dimas in the foothills of the San Gabriel Mountains in Los Angeles County. Lands within this subunit contain Cieneba-Exchequer-Sobrante soils, a type of silty loam, and consist primarily of northern mixed chaparral and coastal sage scrub habitat. Subunit 1b contains the physical and biological features essential to the conservation of *Brodiaea filifolia* because it (1) contains the PCEs for *B. filifolia*, including sandy loam soils (PCE 1E) and areas with a natural, generally intact surface and subsurface soil structure that support *B. filifolia* and pollinator habitat (PCE 2); (2) supports a rare or unique occurrence, representing one of two occurrences located in the foothills of the San Gabriel Mountains part of the Transverse Ranges where the species was historically found; and (3) supports an occurrence of at least 6,000 individuals of *B. filifolia*, as documented in 1990 (CNDDB 2009, p. 37). The physical and biological features essential to the conservation of the species in this subunit may require special management considerations or protection to address threats from urban development on private lands, including minimizing disturbance to the surface and subsurface structure. Please see the ''Special Management Considerations or Protection'' section of this proposed rule for a discussion of the threats to *B. filifolia* habitat and potential management considerations.

Unit 2: San Bernardino County – Arrowhead Hot Springs

Unit 2 is located in San Bernardino County and consists of 61 ac (25 ha) of private land at the southwestern base of the San Bernardino Mountains. This unit was not included in the 2005 final critical habitat designation but is included in this proposed rule based on new information related to the distribution of *Brodiaea filifolia*. Lands within this unit contain Cieneba-rock outcrop complex and Ramona family-Typic Xerothents soils altered by hydrothermal activity, some of which are considered alluvial, and consist primarily of coastal sage scrub habitat. Unit 2 contains the physical and biological features essential to the conservation of *B. filifolia* because it (1) contains the PCEs for *B. filifolia*, including soils altered by hydrothermal activity (PCE 1B) and areas with a natural, generally intact surface and subsurface soil structure that support *B. filifolia* and pollinator habitat (PCE 2); (2) supports a rare or unique occurrence, representing the only occurrence of this plant in the foothills of the San Bernardino Mountains part of the Transverse Ranges where the species was historically found, and representing the type locality for *B. filifolia* (Niehaus 1971, p. 57; CNDDB 2009, p. 7); and (3) supports a stable, persistent occurrence. The physical and biological features essential to the conservation of the species in this subunit may require special management considerations or protection to address threats from nonnative invasive plants. Please see the ''Special Management Considerations or Protection'' section of this proposed rule for a discussion of the threats to *B. filifolia* habitat and potential management considerations.

Unit 3: Central Orange County – Aliso Canyon

Unit 3 is located in central Orange County and consists of 113 ac (46 ha) of local government land in Aliso and Wood Canyons Wilderness Park, in the City of Laguna Niguel, southwestern Orange County. This unit was not included in the 2005 final critical habitat designation but is included in this proposed rule based on new information related to the distribution of *Brodiaea filifolia*. Lands within this unit contain clay loam or other types of loam and consist of annual and needlegrass grassland. Unit 3 contains the physical and biological features essential to the conservation of *B. filifolia* because it (1) contains the PCEs for *B. filifolia*, including loamy soils underlain by a clay subsoil (PCE 1A) and areas with a natural, generally intact surface and subsurface soil structure that support *B. filifolia* and pollinator habitat (PCE 2); and (2) supports an occurrence of at least 5,000 individuals of *B. filifolia*, as documented in 2001 (CNDDB 2009, p. 51). Although this occurrence is protected from urban development as part of Aliso and Wood Canyons Wilderness Park, these lands are managed for recreational use and not specifically for the conservation of *B. filifolia*. The physical and biological features essential to the conservation of the species in this subunit may require special management considerations or protection to address threats from fuel management activities (annual mowing) and pipeline work. Please see the ''Special Management Considerations or Protection'' section of this proposed rule for a discussion of the threats to *B. filifolia* habitat and potential management considerations.

Unit 4: Southern Orange County

Unit 4 is located in southern Orange County and consists of three subunits totaling 925 ac (374 ha). This unit contains 185 ac (75 ha) of local government land and 740 ac (299 ha) of private land.

Subunit 4b: Caspers Wilderness Park

Subunit 4b consists of 185 ac (75 ha) of local government land in Caspers Wilderness Park and 20 ac (8 ha) of private land in the City of San Juan Capistrano, in the southwestern region of the Santa Ana Mountains, southern Orange County. Lands within this proposed subunit contain clay loam, sandy loam, or rocky outcrop, and consist primarily of grassland and sagebrush-buckwheat scrub habitat. Subunit 4b contains the physical and biological features essential to the conservation of *Brodiaea filifolia* because it (1) contains the PCEs for *B. filifolia*, including clay soils and loamy soils underlain by a clay subsoil (PCE 1A), and areas with a natural, generally intact surface and subsurface soil structure that support *B. filifolia* and pollinator habitat (PCE 2); and (2) supports a stable, persistent occurrence.

This subunit is located in the foothills of the Santa Ana Mountains and represents the highest elevation and northernmost occurrence in Orange County. Ninety percent of this occurrence is protected from urban development as part of Caspers Wilderness Park; these lands will be managed and monitored in accordance with the Orange County Southern Subregion HCP for conservation of *B. filifolia*. The physical and biological features essential to the conservation of the species in this subunit may require special management considerations or protection to address threats from nonnative invasive plants. Please see the ''Special Management Considerations or Protection'' section of this proposed rule for a discussion of the threats to *B. filifolia* habitat and potential management considerations. We are considering the portion of this subunit owned by Orange County at Caspers Wilderness Park (185 ac (75 ha)) for exclusion under section 4(b)(2) of the Act because this subunit is within the area addressed by the Orange County Southern Subregion HCP; please see the **Areas Considered for Exclusion Under Section 4(b)(2) of the Act** section of this proposed rule for a discussion about our consideration to exclude this area.

Subunit 4c: Cañada Gobernadora/ Chiquita Ridgeline

Subunit 4c consists of 133 ac (54 ha) of private land in and around Cañada Gobernadora on Rancho Mission Viejo in southern Orange County. Lands within this subunit contain clay, clay loam, or sandy loam and consist primarily of dry-land agriculture and sagebrush-buckwheat scrub habitat. Subunit 4c contains the physical and biological features essential to the conservation of *Brodiaea filifolia* because it (1) contains the PCEs for *B. filifolia*, including clay soils and loamy soils underlain by a clay subsoil (PCE 1A), and areas with a natural, generally intact surface and subsurface soil structure that support *B. filifolia* and pollinator habitat (PCE 2); and (2) supports a stable, persistent occurrence. The physical and biological features essential to the conservation of the species in this subunit may require special management considerations or protection to address threats from the indirect effects associated with urban development. Please see the ''Special Management Considerations or Protection'' section of this proposed rule for a discussion of the threats to *B. filifolia* habitat and potential management considerations. We are considering this subunit for exclusion under section 4(b)(2) of the Act because this subunit is within the area addressed by the Orange County Southern Subregion HCP; please see the **Areas Considered for Exclusion Under Section 4(b)(2) of the Act** section of this proposed rule for a discussion about our consideration to exclude this area.

Subunit 4g: Cristianitos Canyon

Subunit 4g consists of 587 ac (238 ha) of privately owned land in Cristianitos Canyon on Rancho Mission Viejo in southern Orange County. Lands within this subunit are underlain by clay and sandy loam soils and consist primarily of annual grassland and needlegrass grassland. Subunit 4g contains the physical and biological features essential to the conservation of *Brodiaea filifolia* because it (1) contains the PCEs for *B. filifolia*, including clay soils and loamy soils underlain by a clay subsoil (PCE 1A), and areas with a natural, generally intact surface and subsurface soil structure that support *B. filifolia* and pollinator habitat (PCE 2); (2) supports an occurrence in rare and unique habitat, representing one of the few places where this species occurs in needlegrass grassland in Orange County; and (3) supports an occurrence of at least 6,505 individuals of *B. filifolia*, as documented in 2003 (Dudek and Associates, Inc. 2006, Chapter 3 pp. 73-74, 83; Service 2007, pp. 149-150). The physical and biological features essential to the conservation of the species in this subunit may require special management considerations or protection to address threats from the indirect effects associated with urban development. Please see the ''Special Management Considerations or Protection'' section of this proposed rule for a discussion of the threats to *B. filifolia* habitat and potential management considerations. We are considering this subunit for exclusion under section 4(b)(2) of the Act because this subunit is within the area addressed by the Orange County Southern Subregion HCP; please see the **Areas Considered for Exclusion Under Section 4(b)(2) of the Act** section of this proposed rule for a discussion about our consideration to exclude this area.

Unit 5: Northern San Diego County – Devil Canyon

Subunit 5b consists of 266 ac (108 ha) Federal land (Cleveland National Forest) and 8 ac (3 ha) of private land in northern San Diego County. Lands within this subunit contain Cieneba Very Rocky Coarse Sandy Loam, Fallbrook Sandy Loam, and Cieneba Coarse Sandy Loam soils and consist primarily of chaparral and oak woodland vegetation. Subunit 5b contains the physical and biological features essential to the conservation of *Brodiaea filifolia* because it (1) contains the PCEs for *B. filifolia*, including sandy loam soils (PCE 1E) and areas with a natural, generally intact surface and subsurface soil structure that support *B. filifolia* and pollinator habitat (PCE 2); (2) supports an occurrence in rare and unique habitat, representing one of the few places where this species occurs in a drainage in oak woodland habitat and occurring in unusual seeps and drainages on low granitic outcrops; and (3) supports a stable, persistent occurrence. The Cleveland National Forest does not currently have a management plan specific to *B. filifolia*; however, timing of cattle grazing has been adjusted to avoid the flowering period for the species (Winter 2004, pers. comm.). The physical and biological features essential to the conservation of the species in this subunit may require special management considerations or protection to address threats from nonnative invasive plants. Please see the ''Special Management Considerations or Protection'' section of this proposed rule for a discussion of the threats to *B. filifolia* habitat and potential management considerations.

Unit 6: Oceanside, San Diego County

Unit 6 is located in Oceanside, San Diego County and consists of five subunits totaling 231 ac (93 ha) of private land.

Subunit 6a: Alta Creek

Subunit 6a consists of 72 ac (29 ha) of private land in the City of Oceanside, in northern coastal San Diego County. This subunit was not included in the 2005 final critical habitat designation but is included in this proposed rule based on new information related to the distribution of *Brodiaea filifolia*. Lands within this subunit contain fine sandy loam, loam, or loamy fine sand and consist primarily of coastal sage scrub habitat. Subunit 6a contains the physical and biological features essential to the conservation of *B. filifolia* because it (1) contains the PCEs for *B. filifolia*, including loamy soils underlain by a clay subsoil (PCE 1A) and areas with a natural, generally intact surface and subsurface soil structure that support *B. filifolia* and pollinator habitat (PCE 2); and (2) supports a stable, persistent occurrence. The physical and biological features essential to the conservation of the species in this subunit may require special management considerations or protection to address threats from the

indirect effects associated with urban development. Please see the ''Special Management Considerations or Protection'' section of this proposed rule for a discussion of the threats to *B. filifolia* habitat and potential management considerations.

Subunit 6b: Mesa Drive

Subunit 6b consists of 17 ac (7 ha) of private land in the City of Oceanside, in northern coastal San Diego County. Lands within this subunit contain loamy fine sands and consist primarily of grassland habitat. Subunit 6b contains the physical and biological features essential to the conservation of *Brodiaea filifolia* because it (1) contains the PCEs for *B. filifolia*, including loamy soils underlain by a clay subsoil (PCE 1A) and areas with a natural, generally intact surface and subsurface soil structure that support *B. filifolia* and pollinator habitat (PCE 2); and (2) supports a stable, persistent occurrence. The physical and biological features essential to the conservation of the species in this subunit may require special management considerations or protection to address threats from the indirect effects associated with urban development and habitat disturbance on local government lands (Roberts 2005, pp. 1–3). Please see the ''Special Management Considerations or Protection'' section of this proposed rule for a discussion of the threats to *B. filifolia* habitat and potential management considerations.

Subunit 6c: Mission View/ Sierra Ridge

Subunit 6c consists of 12 ac (5 ha) of private land in the City of Oceanside, in northern coastal San Diego County. This subunit was not included in the 2005 final critical habitat designation but is included in this proposed rule based on new information related to the distribution of *Brodiaea filifolia*. Lands within this subunit contain fine loamy sands and consist primarily of coastal sage scrub habitat. Subunit 6c contains the physical and biological features essential to the conservation of *B. filifolia* because it (1) contains the PCEs for *B. filifolia*, including loamy soils underlain by a clay subsoil (PCE 1A) and areas with a natural, generally intact surface and subsurface soil structure that support *B. filifolia* and pollinator habitat (PCE 2); and (2) supports a stable, persistent occurrence. The physical and biological features essential to the conservation of the species in this subunit may require special management considerations or protection to address threats from the indirect effects associated with urban development. Please see the ''Special Management Considerations or Protection'' section of this proposed rule for a discussion of the threats to *B. filifolia* habitat and potential management considerations.

Subunit 6d: Taylor/Darwin

Subunit 6d consists of 35 ac (14 ha) of private land in the City of Oceanside, in northern coastal San Diego County. Lands within this subunit contain clay soil and fine loamy sands and consist primarily of annual and needlegrass grassland. Subunit 6d contains the physical and biological features essential to the conservation of *Brodiaea filifolia* because it (1) contains the PCEs for *B. filifolia*, including loamy soils underlain by a clay subsoil (PCE 1A) and areas with a natural, generally intact surface and subsurface soil structure that support *B. filifolia* and pollinator habitat (PCE 2); and (2) supports an occurrence of at least 6,200 individuals of *B. filifolia*, as documented in 2005 (CNDDB 2009, p. 38). The site is conserved and will not be developed (Helix Environmental Planning, Inc. 2004, p. 5-13). The physical and biological features essential to the conservation of the species in this subunit may require special management considerations or protection to address threats from nonnative invasive plants. Please see the ''Special Management Considerations or Protection'' section of this proposed rule for a discussion of the threats to *B. filifolia* habitat and potential management considerations.

Subunit 6e: Arbor Creek/Colucci

Subunit 6e consists of 94 ac (38 ha) of private land in the City of Oceanside, in northern coastal San Diego County. This subunit was not included in the 2005 final critical habitat designation but is included in this proposed rule based on new information related to the distribution of *Brodiaea filifolia*. Lands within this subunit contain clay soil and fine loamy sands and consist primarily of annual and needlegrass grassland. Subunit 6e contains the physical and biological features essential to the conservation of *B. filifolia* because it (1) contains the PCEs for *B. filifolia*, including loamy soils underlain by a clay subsoil (PCE 1A) and areas with a natural, generally intact surface and subsurface soil structure that support *B. filifolia* and pollinator habitat (PCE 2); and (2) supports a stable, persistent occurrence, which occurs in the largest continuous block of grassland habitat remaining in City of Oceanside. The physical and biological features essential to the conservation of the species in this subunit may require special management considerations or protection to address threats from nonnative invasive plants and urban development. Please see the ''Special Management Considerations or Protection'' section of this proposed rule for a discussion of the threats to *B. filifolia* habitat and potential management considerations.

Unit 7: Carlsbad, San Diego County

Unit 7 is located in Carlsbad, San Diego County and consists of four subunits totaling 263 ac (106 ha) of private land.

Subunit 7a: Letterbox Canyon

Subunit 7a consists of 57 ac (23 ha) of private land in the City of Carlsbad, in northern coastal San Diego County. Lands within this subunit contain heavy clay soils and consist primarily of annual grassland. Subunit 7a contains the physical and biological features essential to the conservation of *Brodiaea filifolia* because it (1) contains the PCEs for *B. filifolia*, including loamy soils underlain by a clay subsoil (PCE 1A) and areas with a natural, generally intact surface and subsurface soil structure that support *B. filifolia* and pollinator habitat (PCE 2); and (2) supports an occurrence of at least 39,500 individuals of *B. filifolia*, as documented in 2005 (CNDDB 2009, p. 15). The site is conserved and will be managed and monitored in perpetuity (Service and CDFG 2005, p. 1). The physical and biological features essential to the conservation of the species in this subunit may require special management considerations or protection to address threats from the indirect effects associated with urban development. Please see the ''Special Management Considerations or Protection'' section of this proposed rule for a discussion of the threats to *B. filifolia* habitat and potential management considerations. We are considering this subunit for exclusion under section 4(b)(2) of the Act because this subunit is within the area addressed by the Carlsbad HMP under the MHCP; please see the **Areas Considered for Exclusion Under Section 4(b)(2) of the Act** section of this proposed rule for a discussion about our consideration to exclude this area.

Subunit 7b: Rancho Carrillo

Subunit 7b consists of 37 ac (15 ha) of private land in the City of Carlsbad, in northern coastal San Diego County. This subunit was not included in the 2005 final critical habitat designation but is included in this proposed rule based on new information related to the distribution of *Brodiaea filifolia*. Lands

within this subunit contain clay or sandy loam soils and consist primarily of annual grasslands and coastal sage scrub habitat. Subunit 7b contains the physical and biological features essential to the conservation of *B. filifolia* because it (1) contains the PCEs for *B. filifolia*, including loamy soils underlain by a clay subsoil (PCE 1A) and areas with a natural, generally intact surface and subsurface soil structure that support *B. filifolia* and pollinator habitat (PCE 2); and (2) supports an occurrence of at least 797,000 individuals of *B. filifolia*, as documented in 2005 (this estimate was of vegetative plants and not flowering plants) (Scheidt and Allen 2005, p. 1). The physical and biological features essential to the conservation of the species in this subunit may require special management considerations or protection to address threats from the indirect effects associated with urban development and nonnative invasive plants. Please see the ''Special Management Considerations or Protection'' section of this proposed rule for a discussion of the threats to *B. filifolia* habitat and potential management considerations. We are considering this subunit for exclusion under section 4(b)(2) of the Act because this subunit is within the area addressed by the Carlsbad HMP under the MHCP; please see the **Areas Considered for Exclusion Under Section 4(b)(2) of the Act** section of this proposed rule for a discussion about our consideration to exclude this area.

Subunit 7c: Calavera Hills Village H

Subunit 7c consists of 71 ac (29 ha) of private land in the City of Carlsbad, in northern coastal San Diego County. Lands within this subunit contain clay soil and consist primarily of annual and needlegrass grassland. Subunit 7c contains the physical and biological features essential to the conservation of *Brodiaea filifolia* because it (1) contains the PCEs for *B. filifolia*, including loamy soils underlain by a clay subsoil (PCE 1A) and areas with a natural, generally intact surface and subsurface soil structure that support *B. filifolia* and pollinator habitat (PCE 2); and (2) supports a stable, persistent occurrence of at least 2,243 plants, as documented in 2008 (McConnell 2008, p. 9). The site is conserved and will not be developed (Planning Systems 2002, pp. 8-9). The physical and biological features essential to the conservation of the species in this subunit may require special management considerations or protection to address threats from nonnative invasive plants. Please see the ''Special Management Considerations or Protection'' section of this proposed rule for a discussion of the threats to *B. filifolia* habitat and potential management considerations. We are considering this subunit for exclusion under section 4(b)(2) of the Act because this subunit is within the area addressed by the Carlsbad HMP under the MHCP; please see the **Areas Considered for Exclusion Under Section 4(b)(2) of the Act** section of this proposed rule for a discussion about our consideration to exclude this area.

Subunit 7d: Rancho La Costa

Subunit 7d consists of 98 ac (40 ha) of private land in the City of Carlsbad, in northern coastal San Diego County. Lands within this subunit contain clay soil and consist primarily of annual and needlegrass grassland. Subunit 7d contains the physical and biological features essential to the conservation of *Brodiaea filifolia* because it (1) contains the PCEs for *B. filifolia*, including loamy soils underlain by a clay subsoil (PCE 1A) and areas with a natural, generally intact surface and subsurface soil structure that support *B. filifolia* and pollinator habitat (PCE 2); and (2) supports an occurrence of at least 13,445 individuals of *B. filifolia*, as documented in 2008 (CNDDB 2009, p. 30). The site is conserved and will not be developed (Center for Natural Lands Management 2005, pp. 1-5). The physical and biological features essential to the conservation of the species in this subunit may require special management considerations or protection to address threats from nonnative invasive plants. Please see the ''Special Management Considerations or Protection'' section of this proposed rule for a discussion of the threats to *B. filifolia* habitat and potential management considerations. We are considering this subunit for exclusion under section 4(b)(2) of the Act because this subunit is within the area addressed by the Carlsbad HMP under the MHCP; please see the **Areas Considered for Exclusion Under Section 4(b)(2) of the Act** section of this proposed rule for a discussion about our consideration to exclude this area.

Unit 8: San Marcos, San Diego County

Unit 8 is located in San Marcos, northern San Diego County and consists of three subunits totaling 108 ac (44 ha) of private land.

Subunit 8b: Rancho Santalina/Loma Alta

Subunit 8b consists of 47 ac (19 ha) of private land in the City of San Marcos, northern San Diego County. This subunit was not included in the 2005 final critical habitat designation but is included in this proposed rule based on new information related to the distribution of *Brodiaea filifolia*. Lands within this subunit contain clay, loam, or loamy fine sand soils and consist primarily of annual and needlegrass grassland. Subunit 8b contains the physical and biological features essential to the conservation of *B. filifolia* because it (1) contains the PCEs for *B. filifolia*, including loamy soils underlain by a clay subsoil (PCE 1A) and areas with a natural, generally intact surface and subsurface soil structure that support *B. filifolia* and pollinator habitat (PCE 2); and (2) supports an occurrence of at least 5,552 individuals of *B. filifolia*, as documented in 2000, and approximately 12,000 *B. filifolia* corms were transplanted to the area in 2004 (CNDDB 2009, p. 10). The physical and biological features essential to the conservation of the species in this subunit may require special management considerations or protection to address threats from the indirect effects associated with urban development, unauthorized recreational activities, and nonnative invasive plants. Please see the ''Special Management Considerations or Protection'' section of this proposed rule for a discussion of the threats to *B. filifolia* habitat and potential management considerations.

Subunit 8d: Upham

Subunit 8d consists of 54 ac (22 ha) of private land in the City of San Marcos, northern San Diego County. Lands within this subunit contain clay soils and consist primarily of annual and needlegrass grassland and vernal pool habitat. Subunit 8d contains the physical and biological features essential to the conservation of *Brodiaea filifolia* because it (1) contains the PCEs for *B. filifolia*, including loamy soils underlain by a clay subsoil (PCE 1A) and areas with a natural, generally intact surface and subsurface soil structure that support *B. filifolia* and pollinator habitat (PCE 2); (2) supports a rare or unique occurrence, representing one of three occurrences that are associated with vernal pool habitat; and (3) supports an occurrence of at least 342,000 individuals of *B. filifolia*, as documented in 1993 (CNDDB 2009, p. 9). The physical and biological features essential to the conservation of the species in this subunit may require special management considerations or protection to address threats from the indirect effects associated with urban development, unauthorized recreational

activities, and nonnative invasive plants. Please see the ''Special Management Considerations or Protection'' section of this proposed rule for a discussion of the threats to *B. filifolia* habitat and potential management considerations.

Subunit 8f: Oleander/San Marcos

Subunit 8f consists of 7 ac (3 ha) of land owned by the San Marcos Unified School District near the City of San Marcos, in northern San Diego County. This subunit was not included in the 2005 final critical habitat designation but is included in this proposed rule based on new information related to the distribution of *Brodiaea filifolia*. Lands within this subunit contain clay, loam, or loamy fine sand soils and consist primarily of annual grassland. Unit 8f contains the physical and biological features essential to the conservation of *B. filifolia* because it (1) contains the PCEs for *B. filifolia*, including loamy soils underlain by a clay subsoil (PCE 1A) and areas with a natural, generally intact surface and subsurface soil structure that support *B. filifolia* and pollinator habitat (PCE 2); and (2) supports an occurrence of at least 3,802 individuals of *B. filifolia*, as documented in 2005 (Dudek and Associates, Inc. 2005, p. 19). The physical and biological features essential to the conservation of the species in this subunit may require special management considerations or protection to address threats from nonnative invasive plants. Please see the ''Special Management Considerations or Protection'' section of this proposed rule for a discussion of the threats to *B. filifolia* habitat and potential management considerations.

Unit 11: Western Riverside County

Unit 11 is located in western Riverside County and consists of eight subunits totaling 1,494 ac (605 ha). This unit contains 53 ac (21 ha) of Federal land, 766 ac (310 ha) of State land, 5 ac (2 ha) of local government land and 670 ac (271 ha) of private land.

Subunit 11a: San Jacinto Wildlife Area

Subunit 11a consists of 385 ac (156 ha) of State land (CDFG) and 16 ac (6 ha) of private land at the San Jacinto Wildlife Area, in western Riverside County. Lands within this subunit contain Willows silty clay, Waukena loam and Waukena fine sandy loam, Traver fine sandy loam and Traver loamy fine sand, and Hanford coarse sandy loam soils and consist primarily of annual grassland, alkali scrub habitat, and alkali playa habitat. Subunit 11a contains the physical and biological features essential to the conservation of *Brodiaea filifolia* because it (1) contains the PCEs for *B. filifolia*, including silty loam soils underlain by a clay subsoil or caliche that are generally poorly drained and moderately to strongly alkaline (PCE 1C) and areas with a natural, generally intact surface and subsurface soil structure that support *B. filifolia* and pollinator habitat (PCE 2); (2) supports a rare or unique occurrence, representing one of four occurrences associated with alkali playa habitat; and (3) supports a stable, persistent occurrence. The physical and biological features essential to the conservation of the species in this subunit may require special management considerations or protection to address threats from nonnative invasive plants and construction of new roads or improvements to existing roadways (Service 2005b, pp. 137, 189). Please see the ''Special Management Considerations or Protection'' section of this proposed rule for a discussion of the threats to *B. filifolia* habitat and potential management considerations. We are considering this subunit for exclusion under section 4(b)(2) of the Act because this subunit is within the area addressed by the Western Riverside County MSHCP; please see the **Areas Considered for Exclusion Under Section 4(b)(2) of the Act** section of this proposed rule for a discussion about our consideration to exclude this area.

Subunit 11b: San Jacinto Avenue and Dawson Road

Subunit 11b consists of 117 ac (47 ha) of private land near San Jacinto Avenue and Dawson Road, in western Riverside County. Lands within this subunit contain Willows silty clay and Domino silt loam soils and consist primarily of annual grassland, alkali scrub habitat, and alkali playa habitat. Subunit 11b contains the physical and biological features essential to the conservation of *Brodiaea filifolia* because it (1) contains the PCEs for *B. filifolia*, including silty loam soils underlain by a clay subsoil or caliche that are generally poorly drained and moderately to strongly alkaline (PCE 1C) and areas with a natural, generally intact surface and subsurface soil structure that support *B. filifolia* and pollinator habitat (PCE 2); and (2) supports a rare or unique occurrence, representing one of four occurrences that are associated with alkali playa habitat. The physical and biological features essential to the conservation of the species in this subunit may require special management considerations or protection to address threats from discing, grazing, manure dumping, and nonnative invasive plants (CNDDB 2009, p. 60). Please see the ''Special Management Considerations or Protection'' section of this proposed rule for a discussion of the threats to *B. filifolia* habitat and potential management considerations. We are considering this subunit for exclusion under section 4(b)(2) of the Act because this subunit is within the area addressed by the Western Riverside County MSHCP; please see the **Areas Considered for Exclusion Under Section 4(b)(2) of the Act** section of this proposed rule for a discussion about our consideration to exclude this area.

Subunit 11c: Case Road

Subunit 11c consists of 180 ac (73 ha) of private land west of I-215, near the City of Perris, in western Riverside County. Lands within this subunit contain Willows silty clay and Domino silt loam soils and consist primarily of agricultural land, floodplain habitat, alkali scrub habitat, and alkali playa habitat. Subunit 11c contains the physical and biological features essential to the conservation of *Brodiaea filifolia* because it (1) contains the PCEs for *B. filifolia*, including silty loam soils underlain by a clay subsoil or caliche that are generally poorly drained and moderately to strongly alkaline (PCE 1C) and areas with a natural, generally intact surface and subsurface soil structure that support *B. filifolia* and pollinator habitat (PCE 2); (2) supports a rare or unique occurrence, representing one of four occurrences that are associated with alkali playa habitat; and (3) supports an occurrence of at least 4,555 individuals of *B. filifolia*, as documented in 2000 (Glenn Lukos Associates, Inc. 2000a, Map of San Jacinto River Stage 3 Project Impacts Version 2 Alignment; Glenn Lukos Associates, Inc. 2000b, pp. 17-18; CNDDB 2009, p. 2). The physical and biological features essential to the conservation of the species in this subunit may require special management considerations or protection to address threats from OHV activity, encroaching urban development, manure dumping, and nonnative invasive plants. Please see the ''Special Management Considerations or Protection'' section of this proposed rule for a discussion of the threats to *B. filifolia* habitat and potential management considerations. We are considering this subunit for exclusion under section 4(b)(2) of the Act because this subunit is within the area addressed by the Western Riverside County MSHCP; please see the **Areas Considered for Exclusion Under Section 4(b)(2) of the Act** section of this

proposed rule for a discussion about our consideration to exclude this area.

Subunit 11d: Railroad Canyon

Subunit 11d consists of 53 ac (21 ha) of Federal land owned by the Bureau of Land Management and 205 ac (83 ha) of private land north of Kabian County Park and southwest of the City of Perris, in western Riverside County. Lands within this subunit contain Lodo rocky loam, Garretson gravelly very fine sandy loam and Garretson very fine sandy loam, Escondido fine sandy loam, and Grangeville fine sandy loam soils and consist primarily of annual grassland. Subunit 11d contains the physical and biological features essential to the conservation of *Brodiaea filifolia* because it (1) contains the PCEs for *B. filifolia*, including silty loam soils underlain by a clay subsoil or caliche that are generally poorly drained and moderately to strongly alkaline (PCE 1C) and areas with a natural, generally intact surface and subsurface soil structure that support *B. filifolia* and pollinator habitat (PCE 2); and (2) supports an occurrence of at least 3,205 individuals of *B. filifolia*, as documented in 2000 (Glenn Lukos Associates 2000a, pp. 13, 24; CNDDB 2009, p. 23). The occurrence in Railroad Canyon is at risk from the proposed San Jacinto River Flood Control Project. That project includes channelization of the river, which may result in changes in floodplain process essential to the species persistence in this subunit (Service 2004b, p. 382). The physical and biological features essential to the conservation of the species in this subunit may require special management considerations or protection to address threats from the indirect effects associated with urban development, river channelization for flood control, and nonnative invasive plants. Please see the ''Special Management Considerations or Protection'' section of this proposed rule for a discussion of the threats to *B. filifolia* habitat and potential management considerations. We are considering this subunit for exclusion under section 4(b)(2) of the Act because this subunit is within the area addressed by the Western Riverside County MSHCP; please see the **Areas Considered for Exclusion Under Section 4(b)(2) of the Act** section of this proposed rule for a discussion about our consideration to exclude this area.

Subunit 11e: Upper Salt Creek (Stowe Pool)

Subunit 11e consists 145 ac (59 ha) of private land in the Upper Salt Creek drainage west of Hemet, in western Riverside County. Lands within this subunit contain Willows silty clay, Chino silt loam, Honcut loam, and Wyman loam and consist primarily of annual grassland, alkali scrub habitat, and alkali playa habitat. Subunit 11e contains the physical and biological features essential to the conservation of *Brodiaea filifolia* because it (1) contains the PCEs for *B. filifolia*, including silty loam soils underlain by a clay subsoil or caliche that are generally poorly drained and moderately to strongly alkaline (PCE 1C), and areas with a natural, generally intact surface and subsurface soil structure that support *B. filifolia* and pollinator habitat (PCE 2); and (2) supports a rare or unique occurrence, representing one of three occurrences that are associated with vernal pool habitat. This subunit is crossed by roadways that, if altered (widened or realigned), could change the topography and thereby negatively affect the hydrologic integrity of the pool complexes and favor the growth of nonnative invasive plant species (CNDDB 2009, p. 24; Service 2004b, p. 382). The physical and biological features essential to the conservation of the species in this subunit may require special management considerations or protection to address threats from nonnative invasive plants and transportation projects. Please see the ''Special Management Considerations or Protection'' section of this proposed rule for a discussion of the threats to *B. filifolia* habitat and potential management considerations. We are considering this subunit for exclusion under section 4(b)(2) of the Act because this subunit is within the area addressed by the Western Riverside County MSHCP; please see the **Areas Considered for Exclusion Under Section 4(b)(2) of the Act** section of this proposed rule for a discussion about our consideration to exclude this area.

Subunit 11f: Santa Rosa Plateau - Mesa de Colorado

Subunit 11f consists of 221 ac (89 ha) of State-owned land, 5 ac (2 ac) of local government land and 8 ac (3 ha) of private land on the Santa Rosa Plateau, in southwestern Riverside County. Lands within this subunit contain Murrieta stony clay loam, and Las Posas rocky loam and Las Posas loam soils and consist primarily of annual and needlegrass grassland and vernal pool habitat. Subunit 11f contains the physical and biological features essential to the conservation of *Brodiaea filifolia* because it (1) contains the PCEs for *B. filifolia*, including clay loam soil series underlain by heavy clay loams or clays derived from olivine basalt lava flows that generally occur on mesas and gentle to moderate slopes (PCE 1D) and areas with a natural, generally intact surface and subsurface soil structure that support *B. filifolia* and pollinator habitat (PCE 2); (2) supports a rare or unique occurrence, representing one of three occurrences that are associated with vernal pool habitat; and (3) supports an occurrence of at least 31,725 individuals of *B. filifolia*, as documented in 1990 (CNDDB 2009, p. 5). The physical and biological features essential to the conservation of the species in this subunit may require special management considerations or protection to address threats from the indirect effects associated with urban development and nonnative invasive plants. Please see the ''Special Management Considerations or Protection'' section of this proposed rule for a discussion of the threats to *B. filifolia* habitat and potential management considerations. We are considering this subunit for exclusion under section 4(b)(2) of the Act because this subunit is within the area addressed by the Western Riverside County MSHCP; please see the **Areas Considered for Exclusion Under Section 4(b)(2) of the Act** section of this proposed rule for a discussion about our consideration to exclude this area.

Subunit 11g: Santa Rosa Plateau - South of Tenaja Road

Subunit 11g consists of 117 ac (47 ha) of State-owned land on the Santa Rosa Plateau, in southwestern Riverside County. Lands within this subunit contain Murrieta stony clay loam, and Las Posas rocky loam and Las Posas loam soils and consist primarily of annual and needlegrass grassland and vernal pool habitat. Subunit 11g contains the physical and biological features essential to the conservation of *Brodiaea filifolia* because it (1) contains the PCEs for *B. filifolia*, including clay loam soil series underlain by heavy clay loams or clays derived from olivine basalt lava flows that generally occur on mesas and gentle to moderate slopes (PCE 1D) and areas with a natural, generally intact surface and subsurface soil structure that support *B. filifolia* and pollinator habitat (PCE 2); and (2) supports a rare or unique occurrence, occurring along an ephemeral drainage in seep type habitats. The physical and biological features essential to the conservation of the species in this subunit may require special management considerations or protection to address threats from nonnative invasive plants. Please see the ''Special Management Considerations or Protection'' section of

this proposed rule for a discussion of the threats to *B. filifolia* habitat and potential management considerations. We are considering this subunit for exclusion under section 4(b)(2) of the Act because this subunit is within the area addressed by the Western Riverside County MSHCP; please see the **Areas Considered for Exclusion Under Section 4(b)(2) of the Act** section of this proposed rule for a discussion about our consideration to exclude this area.

Subunit 11h: Santa Rosa Plateau - North of Tenaja Road

Subunit 11h consists of 44 ac (18 ha) of State-owned land on the Santa Rosa Plateau, in southwestern Riverside County. Lands within this subunit contain Murrieta stony clay loam, and Las Posas rocky loam and Las Posas loam soils and consist primarily of annual and needlegrass grassland and vernal pool habitat. Subunit 11h contains the physical and biological features essential to the conservation of *Brodiaea filifolia* because it (1) contains the PCEs for *B. filifolia*, including clay loam soil series underlain by heavy clay loams or clays derived from olivine basalt lava flows that generally occur on mesas and gentle to moderate slopes (PCE 1D), and areas with a natural, generally intact surface and subsurface soil structure that support *B. filifolia* and pollinator habitat (PCE 2); and (2) supports a rare or unique occurrence, occurring along an ephemeral drainage in seep type habitats. The physical and biological features essential to the conservation of the species in this subunit may require special management considerations or protection to address threats from nonnative invasive plants. Please see the ''Special Management Considerations or Protection'' section of this proposed rule for a discussion of the threats to *B. filifolia* habitat and potential management considerations. We are considering this subunit for exclusion under section 4(b)(2) of the Act because this subunit is within the area addressed by the Western Riverside County MSHCP; please see the **Areas Considered for Exclusion Under Section 4(b)(2) of the Act** section of this proposed rule for a discussion about our consideration to exclude this area.

Unit 12: Central San Diego County – Artesian Trails

Unit 12 is located in central San Diego County and consists of 109 ac (44 ha) of private land. This unit was not included in the 2005 final critical habitat designation but is included in this proposed rule based on new information related to the distribution of *Brodiaea filifolia*. Lands within this subunit contain fine loamy sands and consist primarily of coastal sage scrub habitat and annual grassland. Unit 12 contains physical and biological features that are essential to the conservation of *B. filifolia* because it (1) contains the PCEs for *B. filifolia*, including loamy soils underlain by a clay subsoil (PCE 1A) and areas with a natural, generally intact surface and subsurface soil structure that support *B. filifolia* and pollinator habitat (PCE 2); and (2) supports a stable, persistent occurrence. The physical and biological features essential to the conservation of the species in this subunit may require special management considerations or protection to address threats from the indirect effects associated with urban development and nonnative invasive plants. Please see the ''Special Management Considerations or Protection'' section of this proposed rule for a discussion of the threats to *B. filifolia* habitat and potential management considerations. We are considering this subunit for exclusion under section 4(b)(2) of the Act because this subunit is within the area addressed by the Western Riverside County MSHCP; please see the **Areas Considered for Exclusion Under Section 4(b)(2) of the Act** section of this proposed rule for a discussion about our consideration to exclude this area.

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that actions they fund, authorize, or carry out are not likely to destroy or adversely modify critical habitat. Decisions by the Fifth and Ninth Circuit Courts of Appeals have invalidated our definition of ''destruction or adverse modification'' (50 CFR 402.02) (see *Gifford Pinchot Task Force* v. *U.S. Fish and Wildlife Service*, 378 F. 3d 1059 (9th Cir 2004) and *Sierra Club* v. *U.S. Fish and Wildlife Service et al.*, 245 F.3d 434, 442F (5th Cir 2001)), and we do not rely on this regulatory definition when analyzing whether an action is likely to destroy or adversely modify critical habitat. Under the statutory provisions of the Act, we determine destruction or adverse modification on the basis of whether, with implementation of the proposed Federal action, the affected critical habitat would remain functional (or retain the current ability for the PCEs to be functionally established) to serve its intended conservation role for the species (Service 2004c, p. 3). Section 7(a)(2) of the Act requires Federal agencies, including the Service, to evaluate their actions with respect to any species that is endangered or threatened and with respect to its critical habitat, if any is proposed or designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402.

Section 7(a)(4) of the Act requires Federal agencies to confer with us on any action that is likely to jeopardize the continued existence of a species proposed for listing or result in destruction or adverse modification of proposed critical habitat. Conference reports provide conservation recommendations to assist the agency in eliminating conflicts that may be caused by the proposed action. We may issue a formal conference report if requested by a Federal agency. Formal conference reports on proposed critical habitat contain an opinion that is prepared according to 50 CFR 402.14, as if critical habitat were designated. We may adopt the formal conference report as the biological opinion when the critical habitat is designated, if no substantial new information or changes in the action alter the content of the opinion (see 50 CFR 402.10(d)). The conservation recommendations in a conference report or opinion are advisory.

If a species is listed or critical habitat is designated, section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of such a species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. As a result of this consultation, we document compliance with the requirements of section 7(a)(2) through our issuance of:

(1) A concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or designated critical habitat; or

(2) A biological opinion for Federal actions that are likely to adversely affect listed species or designated critical habitat.

An exception to the concurrence process referred to in (1) above occurs in consultations involving National Fire Plan projects. In 2004, the U.S. Forest Service and the BLM reached agreements with the Service to streamline a portion of the section 7 consultation process (BLM–ACA 2004, pp. 1–8; FS–ACA 2004, pp. 1–8). The agreements allow the U.S. Forest Service and the BLM the opportunity to

make ''not likely to adversely affect'' (NLAA) determinations for projects implementing the National Fire Plan. Such projects include prescribed fire, mechanical fuels treatments (thinning and removal of fuels to prescribed objectives), emergency stabilization, burned area rehabilitation, road maintenance and operation activities, ecosystem restoration, and culvert replacement actions. The U.S. Forest Service and the BLM must insure staff are properly trained, and both agencies must submit monitoring reports to the Service to determine if the procedures are being implemented properly and that effects on endangered species and their habitats are being properly evaluated. As a result, we do not believe the alternative consultation processes being implemented as a result of the National Fire Plan will differ significantly from those consultations being conducted by the Service.

If we issue a biological opinion concluding that a project is likely to jeopardize the continued existence of a listed species or destroy or adversely modify critical habitat, we also provide reasonable and prudent alternatives to the project, if any are identifiable. We define ''reasonable and prudent alternatives'' at 50 CFR 402.02 as alternative actions identified during consultation that:

- Can be implemented in a manner consistent with the intended purpose of the action,
- Can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction,
- Are economically and technologically feasible, and
- Would, in the Director's opinion, avoid jeopardizing the continued existence of the listed species or destroying or adversely modifying its critical habitat.

Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions in instances where we have listed a new species or subsequently designated critical habitat that may be affected and the Federal agency has retained discretionary involvement or control over the action (or the agency's discretionary involvement or control is authorized by law). Consequently, Federal agencies may sometimes need to request reinitiation of consultation with us on actions for which formal consultation has been completed, if those actions with discretionary involvement or control may affect subsequently listed species or designated critical habitat.

Federal activities that may affect *Brodiaea filifolia* or its designated critical habitat will require section 7(a)(2) consultation under the Act. Activities on State, tribal, local, or private lands requiring a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or a permit under section 10(a)(1)(B) of the Act from the Service) or involving some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency) will also be subject to the section 7(a)(2) consultation process. Federal actions not affecting listed species or critical habitat, and actions on State, tribal, local, or private lands that are not federally funded, authorized, or permitted, do not require section 7(a)(2) consultations.

Application of the ''Adverse Modification'' Standard

The key factor related to the adverse modification determination is whether, with implementation of the proposed Federal action, the affected critical habitat would continue to serve its intended conservation role for the species, or would retain its current ability for the primary constituent elements to be functionally established. Activities that may destroy or adversely modify critical habitat are those that alter the physical and biological features to an extent that appreciably reduces the conservation value of critical habitat for *Brodiaea filifolia*. Generally, the conservation role of the *B. filifolia* proposed revised critical habitat units is to support viable populations throughout this species' range.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe in any proposed or final regulation that designates critical habitat those activities involving a Federal action that may destroy or adversely modify such habitat, or that may be affected by such designation.

Activities that, when carried out, funded, or authorized by a Federal agency, may affect critical habitat and therefore should result in consultation for *Brodiaea filifolia* include, but are not limited to, the following:

(1) Actions that result in ground disturbance. Such activities could include (but are not limited to) residential or commercial development, OHV activity, pipeline construction, new road construction or widening, existing road maintenance, manure dumping, and grazing. These activities potentially impact the habitat and PCEs of *Brodiaea filifolia* by damaging, disturbing, and altering soil composition through direct impacts, increased erosion, and increased nutrient content. Additionally, changes in soil composition may lead to changes in the vegetation composition, thereby changing the overall habitat type.

(2) Actions that result in alteration of the hydrological regimes typically associated with *Brodiaea filifolia* habitat. Such activities could include residential or commercial development, OHV activity, pipeline construction, new road construction or widening, existing road maintenance, and channelization of drainages. These activities could alter surface layers and the hydrological regime in a manner that promotes loss of soil matrix components and moisture necessary to support the growth and reproduction of *B. filifolia*.

(3) Actions that would disturb the existing vegetation communities adjacent to *Brodiaea filifolia* habitat prior to annual pollination and seed set (reproduction). Such activities could include (but are not limited to) grazing, mowing, grading, or discing habitat in the spring and early summer months. These activities could alter the habitat for pollinators leading to potential decreased pollination and reproduction.

(4) Road construction and maintenance, right-of-way designation, and regulation of agricultural activities, or any activity funded or carried out by the Department of Transportation or Department of Agriculture that could result in excavation, or mechanized land clearing of *Brodiaea filifolia* habitat. These activities could alter the habitat in such a way that soil, seeds, and corms of *B. filifolia* are removed and which permanently alter the habitat.

(5) Licensing or construction of communication sites by the Federal Communications Commission or funding of construction or development activities by the U.S. Department of Housing and Urban Development that could result in excavation, or mechanized land clearing of *Brodiaea filifolia* habitat.

Exemptions Under Section 4(a)(3) of the Act

The National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108–136) amended the Act to limit areas eligible for designation as critical habitat. Specifically, section 4(a)(3)(B)(i)

of the Act (16 U.S.C. 1533(a)(3)(B)(i)) now provides: ''The Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan prepared under section 101 of the Sikes Act [Improvement Act of 1997 (Sikes Act)] (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation.''

The Sikes Act required each military installation that includes land and water suitable for the conservation and management of natural resources to complete an integrated natural resources management plan (INRMP) by November 17, 2001. An INRMP integrates implementation of the military mission of the installation with stewardship of the natural resources found on the base. Each INRMP includes:

(1) An assessment of the ecological needs on the installation, including the need to provide for the conservation of listed species;

(2) A statement of goals and priorities;

(3) A detailed description of management actions to be implemented to provide for these ecological needs; and

(4) A monitoring and adaptive management plan.

Among other things, each INRMP must, to the extent appropriate and applicable, provide for fish and wildlife management; fish and wildlife habitat enhancement or modification; wetland protection, enhancement, and restoration where necessary to support fish and wildlife; and enforcement of applicable natural resource laws.

We consult with the military on the development and implementation of INRMPs for installations with federally listed species. Only one military installation with an approved INRMP, Marine Corps Base Camp Pendleton (MCB Camp Pendleton), is located within the range of *Brodiaea filifolia* and supports features essential to the species' conservation. We analyzed MCB Camp Pendleton's INRMP to determine if the lands subject to the INRMP should be exempted under the authority of section 4(a)(3)(B) of the Act.

Marine Corps Base Camp Pendleton has committed to work closely with us, CDFG, and California Department of Parks and Recreation (CDPR) to continually refine the existing INRMP as part of the Sikes Act's INRMP review process. Based on the considerations discussed below and in accordance with section 4(a)(3)(B)(i) of the Act, we have determined that conservation efforts identified in the INRMP provide a benefit to *Brodiaea filifolia* occurring in habitats within or adjacent to MCB Camp Pendleton. Therefore, approximately 1,531 ac (620 ha) of habitat on MCB Camp Pendleton subject to the INRMP is exempt from critical habitat designation under section 4(a)(3) of the Act, and is not included in this proposed revised critical habitat designation.

In the previous final critical habitat designation for *Brodiaea filifolia*, we exempted lands determined to contain features essential to the conservation of species on MCB Camp Pendleton from the designation of critical habitat (70 FR 73820; December 13, 2005). We based this decision on the conservation benefits to *B. filifolia* identified in the INRMP developed by MCB Camp Pendleton in November 2001. A revised and updated INRMP was prepared by MCB Camp Pendleton in March 2007 (MCB Camp Pendleton 2007). We determined that conservation efforts identified in the INRMP provide a benefit to the populations of *B. filifolia* and this species' habitat occurring on MCB Camp Pendleton (MCB Camp Pendleton 2007, Section 4, pp. 51–76). The INRMP provides measures that promote the conservation of *B. filifolia* within the 1,531 ac (620 ha) of habitat that we believe contain the features essential to the conservation of *B. filifolia* on MCB Camp Pendleton, which are subject to the INRMP, within the following areas: Cristianitos Canyon, Bravo One, Bravo Two South, Basilone/San Mateo Junction, Camp Horno, Pilgrim Creek, and South White Beach.

Measures included for *Brodiaea filifolia* in the MCB Camp Pendleton INRMP require ongoing efforts to survey and monitor the species, and provide this information to all necessary personnel through MCB Camp Pendleton's GIS database on sensitive resources and in their published resource atlas. The updated INRMP includes the following conservation measures for *B. filifolia*: (1) Surveys and monitoring, studies, impact avoidance and minimization, and habitat restoration and enhancement; (2) species survey information stored in MCB Camp Pendleton's GIS database and recorded in a resource atlas that is published and updated on a semi-annual basis; (3) use of the resource atlas to plan operations and projects to avoid impacts to *B. filifolia* and to trigger section 7 consultations if an action may affect the species; and (4) transplantation when avoidance is not possible. These measures are established and represent ongoing aspects of existing programs that provide a benefit to *B. filifolia*. MCB Camp Pendleton also has Base directives and Range and Training Regulations that are integral to their INRMP and provide benefits to *B. filifolia*. MCB Camp Pendleton implements Base directives to avoid and minimize adverse effects to *B. filifolia*, such as: (1) Limit bivouac, command post, and field support activities such that they are no closer than 164 ft (50 m) to occupied habitat year round; (2) limit vehicle and equipment operations to existing road and trail networks year round; and (3) require environmental clearance prior to any soil excavation, filling, or grading. Finally, MCB Camp Pendleton has contracted and funded surveys for *B. filifolia* in summer 2005 and development of a GIS-based monitoring system that will provide improved management of natural resources on the installation, including for *B. filifolia*.

Additionally, MCB Camp Pendleton's environmental security staff review projects and enforce existing regulations and orders that, through their implementation, avoid and minimize impacts to natural resources, including *Brodiaea filifolia* and its habitat. As a result, activities occurring on MCB Camp Pendleton are currently being conducted in a manner that minimizes impacts to *B. filifolia* habitat. Finally, MCB Camp Pendleton provides training to personnel on environmental awareness for sensitive resources on the Base including *B. filifolia* and its habitat.

Based on MCB Camp Pendleton's Sikes Act program (including the management of *Brodiaea filifolia*), there is a high degree of certainty that MCB Camp Pendleton will continue to implement their INRMP in coordination with the Service and the CDFG in a manner that provides a benefit to *B. filifolia*, coupled with a high degree of certainty that the conservation efforts of their INRMP will be effective. Service biologists work closely with MCB Camp Pendleton on a variety of issues relating to endangered and threatened species, including *B. filifolia*. The management programs, Base directives, and Range and Training Regulations that avoid and minimize impacts to *B. filifolia* are consistent with section 7 consultations with MCB Camp Pendleton. Therefore, the Secretary has determined that the INRMP for MCB Camp Pendleton provides a benefit for *B. filifolia*, and lands subject to the INRMP for MCB Camp Pendleton containing features essential to the conservation of the species are exempt from critical habitat

designation pursuant to section 4(a)(3) of the Act. As a result, we are not including approximately 1,531 ac (620 ha) of habitat for *B. filifolia* on MCP Camp Pendleton in this proposed revised critical habitat designation.

Areas Considered for Exclusion Under Section 4(b)(2) of the Act

Section 4(b)(2) of the Act states that the Secretary must designate or revise critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. In making that determination, the legislative history is clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor.

Under section 4(b)2) of the Act, in considering whether to exclude a particular area from the designation, we must identify the benefits of including the area in the designation, identify the benefits of excluding the area from the designation, and determine whether the benefits of exclusion outweigh the benefits of inclusion. If, based on this analysis, we determine that the benefits of exclusion outweigh the benefits of inclusion, we can exclude the area only if such exclusion would not result in the extinction of the species.

An analysis of the economic impacts for our previous proposed critical habitat designation was conducted and made available to the public on October 6, 2005 (70 FR 58361). This economic analysis was finalized for the final rule to designate critical habitat for *Brodiaea filifolia* as published in the **Federal Register** on December 13, 2005 (70 FR 58361). In compliance with section 4(b)(2) of the Act we are preparing a new draft economic analysis of the impacts of this proposed revision to critical habitat for *B. filifolia*, to evaluate the potential impacts of this proposed revised designation and related factors. See the ''Regulatory Flexibility Act'' section for more information. We will announce the availability of the draft economic analysis as soon as it is completed, at which time we will seek public review and comment. At that time, copies of the draft economic analysis will be available for downloading from the Internet at *http://www.regulations.gov*, or by contacting the Carlsbad Fish and Wildlife Office directly (see **FOR FURTHER INFORMATION CONTACT**). Based on public comment on that document and the proposed designation itself, as well as the information in the final economic analysis, the Secretary may exclude from critical habitat areas different from those identified for possible exclusion in this proposed rule under the provisions of section 4(b)(2) of the Act, up to and including all areas proposed for designation. This is also addressed in our implementing regulations at 50 CFR 424.19.

In addition to economic impacts, we consider a number of factors in a section 4(b)(2) analysis. For example, we consider whether there are lands owned by the Department of Defense where a national security impact might exist. We also consider whether landowners have developed any habitat conservation plans (HCPs) or other management plans for the area, or whether there are conservation partnerships that would be encouraged or discouraged by designation of, or exclusion from, critical habitat in an area. In addition, we look at the presence of Tribal lands or Tribal Trust resources that might be affected, and consider the government-to-government relationship of the United States with the Tribal entities. We also consider any social impacts that might occur because of the designation.

As discussed in further detail in the *Habitat Conservation Plan Lands—Exclusions under Section 4(b)(2) of the Act* section below, we have preliminarily identified certain areas that we are considering excluding from the final revised critical habitat designation for *Brodiaea filifolia* under section 4(b)(2) of the Act. However, we specifically solicit comments on the inclusion or exclusion of such areas (see **Public Comments** section).

Most federally listed species in the United States will not recover without the cooperation of non-Federal landowners. More than 60 percent of the United States is privately owned (National Wilderness Institute 1995, p. 2), and at least 80 percent of endangered or threatened species occur either partially or solely on private lands (Crouse *et al.* 2002, p. 720). Stein *et al.* (1995, p. 400) found that only about 12 percent of listed species were found almost exclusively on Federal lands (90 to 100 percent of their known occurrences restricted to Federal lands) and that 50 percent of federally listed species are not known to occur on Federal lands at all.

Given the distribution of listed species with respect to land ownership, conservation of listed species in many parts of the United States is dependent upon working partnerships with a wide variety of entities and the voluntary cooperation of many non-Federal landowners (Wilcove and Chen 1998, p. 1407; Crouse *et al.* 2002, p. 720; James 2002, p. 271). Building partnerships and promoting voluntary cooperation of landowners are essential to our understanding the status of species on non-Federal lands, and necessary for us to implement recovery actions such as reintroducing listed species and restoring and protecting habitat.

Many private landowners, however, are wary of the possible consequences of attracting endangered species to their property. Mounting evidence suggests that some regulatory actions by the Federal government, while well-intentioned and required by law, can (under certain circumstances) have unintended negative consequences for the conservation of species on private lands (Wilcove *et al.* 1996, pp. 5–6; Bean 2002, pp. 2–3; Conner and Mathews 2002, pp. 1–2; James 2002, pp. 270–271; Koch 2002, pp. 2–3; Brook *et al.* 2003, pp. 1639–1643). Many landowners fear a decline in their property value due to real or perceived restrictions on land use options where threatened or endangered species are found. Consequently, harboring endangered species is viewed by many landowners as a liability. This perception results in anti-conservation incentives, because maintaining habitats that harbor endangered species represents a risk to future economic opportunities (Main *et al.* 1999, pp. 1264–1265; Brook *et al.* 2003, pp. 1644–1648).

The purpose of designating critical habitat is to contribute to the conservation of threatened and endangered species and the ecosystems upon which they depend. The outcome of the designation, triggering regulatory requirements for actions funded, authorized, or carried out by Federal agencies under section 7(a)(2) of the Act, can sometimes be counterproductive to its intended purpose on non-Federal lands. Thus, the benefits of excluding areas that are covered by effective partnerships or other voluntary conservation commitments can often be high, particularly for listed plant species.

Habitat Conservation Plan Lands—Exclusions under Section 4(b)(2) of the Act

The benefits of excluding lands with approved HCPs that cover listed plant

species from critical habitat designation include relieving landowners, communities, and counties of any additional regulatory burden that might be imposed by critical habitat. Many HCPs take years to develop, and upon completion, are consistent with recovery objectives for listed species that are covered within the plan area. Many HCPs also provide conservation benefits to unlisted sensitive species.

A related benefit of excluding lands covered by approved HCPs from critical habitat designation is the unhindered, continued ability it gives us to seek new partnerships with future plan participants, including States, counties, local jurisdictions, conservation organizations, and private landowners, which together can implement conservation actions that we would be unable to accomplish otherwise. Habitat conservation plans often cover a wide range of species, including listed plant species and species that are not State and federally listed and would otherwise receive little protection from development. By excluding these lands, we preserve our current partnerships and encourage additional conservation actions in the future.

Brodiaea filifolia is covered under the Orange County Southern Subregion HCP, the Carlsbad HMP under the MHCP, the Western Riverside County MSHCP, and the City and County of San Diego Subarea Plans under the MSCP. The Secretary is considering exercising his discretion to exclude lands covered by these plans (see Table 5 for a list of the subunits that are being considered for exclusion). In this revised proposed rule, we are seeking input from the stakeholders in these HCPs and from the public on lands that the Secretary should consider for exclusion from the final designation of critical habitat for *B. filifolia*.

TABLE 5. LANDS THAT MEET THE DEFINITION OF CRITICAL HABITAT, ARE INCLUDED IN APPROVED HABITAT CONSERVATION PLANS (HCPS), AND ARE BEING CONSIDERED FOR EXCLUSION UNDER SECTION 4(B)(2) OF THE ACT IN THIS PROPOSED REVISED CRITICAL HABITAT DESIGNATION.

HCP and Associated Subunit	Area considered for exclusion (acres/hectares) [1]
Orange County Southern Subregion HCP	
4b. Caspers Wilderness Park	205 ac (83 ha)
4c. Cañada Gobernadora/Chiquita Ridgeline	133 ac (54 ha)
4g. Cristianitos Canyon	587 ac (238 ha)
Subtotal Orange County Southern Subregion HCP	*925 ac (374 ha)*
Carlsbad HMP under the San Diego MHCP	
7a. Letterbox Canyon	57 ac (23 ha)
7b. Rancho Carrillo	37 ac (15 ha)
7c. Calavera Hills Village H	71 ac (29 ha)
7d. Rancho La Costa (Villages of La Costa HCP)	98 ac (40 ha)
Subtotal Carlsbad HMP under the San Diego MHCP	*263 ac (106 ha)*
Western Riverside County MSHCP	
11a. San Jacinto Wildlife Area	401 ac (162 ha)
11b. San Jacinto Avenue/Dawson Road	117 ac (47 ha)
11c. Case Road	180 ac (73 ha)
11d. Railroad Canyon	257 ac (104 ha)
11e. Upper Salt Creek (Stowe Pool)	145 ac (59 ha)
11f. Santa Rosa Plateau – Mesa de Colorado	234 ac (95 ha)
11g. Santa Rosa Plateau – South of Tenaja Road	117 ac (47 ha)
11h. Santa Rosa Plateau – North of Tenaja Road	44 ac (18 ha)
Subtotal for Western Riverside County MSHCP	*1,494 ac (605 ha)*
City and County of San Diego Subarea Plans under the San Diego MSCP	
12. Central San Diego County - Artesian Trails	109 ac (44 ha)
Subtotal for City and County of San Diego Subarea Plans under the San Diego MSCP	*109 ac (44 ha)*
Total	2,791 ac (1,129 ha)

[1] Values in this table may not sum due to rounding.

Below is a brief description of the lands proposed as critical habitat covered by each HCP that the Secretary is considering to exercise his discretion to exclude.

Orange County Southern Subregion HCP

The Orange County Southern Subregion HCP is a large-scale multi-jurisdictional HCP encompassing approximately 86,021 ac (34,811 ha) in southern Orange County. The Orange County Southern Subregion HCP was developed by the County of Orange (County), Rancho Mission Viejo, and the Santa Margarita Water District (Water District) to address impacts to 32 species, including *Brodiaea filifolia*, resulting from residential and associated infrastructure development. The Service issued incidental take permits on January 10, 2007 (Service 2007, p. 431), under section 10(a)(1)(B) of the Act to the three permittees for a period of 75 years. Specifically, the Secretary is considering to exercise his discretion to exclude 925 ac (374 ha) in Subunits 4b, 4c, and 4g that are included in the area covered by the Orange County Southern Subregion HCP (see Table 5 for the amount of land being considered for exclusion in each subunit).

The Orange County Southern Subregion HCP will establish approximately 30,426 ac (12,313 ha) of habitat reserve (Service 2007, p. 19). The HCP provides for a large, biologically diverse and permanent habitat reserve that will protect: (1) Large blocks of natural vegetation communities that provide habitat for the covered species; (2) ''important'' and ''major'' populations of the covered species in key locations; (3) wildlife corridors and habitat linkages that connect the large habitat blocks and covered species populations to each other, the Cleveland National Forest, and the adjacent Orange County Central-Coastal NCCP/HCP; and (4) the underlying hydrogeomorphic processes that support the major vegetation communities providing habitat for the covered species (Service 2007, p. 10).

Specific land use purposes are identified in the Orange County Southern Subregion HCP. In each of the areas that we proposed as critical habitat, lands were mapped as Reserves and Open Space Areas. These two categories of land use make up areas within the Orange County Southern Subregion HCP that are conserved or will be conserved as the plan is implemented. In Subunit 4b, Caspers Wilderness Park, all 205 ac (83 ha) of the proposed critical habitat that are within the plan area are conserved or will be conserved under the HCP. In Subunit 4c, Cañada Gobernadora/Chiquita Ridgeline, 90 ac (36 ha) of the 133 ac (54 ha) of proposed critical habitat within the plan area are conserved or will be conserved under the HCP. In Subunit 4g, Cristianitos Canyon, 339 ac (137 ha) of the 587 ac (238 ha) of proposed critical habitat within the plan area are conserved or will be conserved under the HCP. The remaining 249 ac (101 ha) of land in Subunit 4G are identified as potential orchards. Overall, 652 ac (264 ha) of the 925 ac (374 ha) that we are considering for exclusion under section 4(b)(2) of the Act are conserved or will be conserved under the HCP.

In addition to the creation of a habitat reserve, the following conservation measures specified in the Orange County Southern Subregion HCP will contribute to the protection and management of *Brodiaea filifolia* habitat: (1) Habitat conservation and restoration activities will occur in the areas identified as ''important'' and ''major'' populations under the Orange County Southern Subregion HCP (such actions for *B. filifolia* within the Habitat Reserve would include the control of nonnative invasive species); (2) monitoring of *B. filifolia* will focus on the Cañada Gobernadora/Chiquita Ridgeline and Cristianitos Canyon occurrences (which are the two largest occurrences); (3) monitoring and management associated with the Orange County Southern Subregion HCP should help address the threat of competition with nonnative invasive species; (4) plans will be developed for construction projects near occurrences of *B. filifolia* to minimize any indirect effect of the projects; and (5) the Orange County Southern Subregion HCP includes a Translocation, Propagation, and Management Plan for Special-Status Plants (Appendix I of the Orange County Southern Subregion HCP) that describes the various methods for restoration of *B. filifolia*, including seed collection, receptor site selection and preparation, greenhouse propagation, translocation, introduction, direct seeding, and long-term maintenance (Service 2007, pp. 152–156).

In summary, the Secretary is considering to exercise his discretion to exclude 925 ac (374 ha) that meet the definition of critical habitat for *Brodiaea filifolia* within the Orange County Southern Subregion HCP under section 4(b)(2) of the Act. The 1998 final listing rule for *B. filifolia* identified the following primary threats for this species: urbanization, alteration of hydrological conditions and channelization of drainages, discing for dry-land farming and fire suppression practices, OHV activity, grazing, drought, and competition from nonnative invasive plants (63 FR 54938; October 13, 1998, pp. 54983–54989). The Orange County Southern Subregion HCP enacts conservation measures that minimize the impact of these threats on *B. filifolia*. We will analyze the benefits of inclusion and the benefits of exclusion of the areas covered by this plan in the final revised critical habitat rule for *B. filifolia*. We encourage any public comment in relation to our consideration of the areas in Subunits 4b, 4c, and 4g for exclusion (see **Public Comments** section above).

San Diego Multiple Habitat Conservation Program (MHCP)

The San Diego MHCP is a comprehensive, multi-jurisdictional, planning program designed to create, manage, and monitor an ecosystem preserve in northwestern San Diego County. The San Diego MHCP is also a regional subarea plan under the State of California's Natural Communities Conservation Plan (NCCP) program and was developed in cooperation with CDFG. The MHCP preserve system is intended to protect viable populations of native plant and animal species and their habitats in perpetuity, while accommodating continued economic development and quality of life for residents of northern San Diego County. The MHCP includes an approximately 112,000 ac (45,324 ha) study area within the cities of Carlsbad, Encinitas, Escondido, San Marcos, Oceanside, Vista, and Solana Beach. The Secretary is considering to exercise his discretion to exclude lands covered by the Carlsbad HMP; the only completed subarea plan under the MHCP. The 10(a)(1)(B) permit for the Carlsbad HMP was issued on November 9, 2004 (Service 2004a). Specifically, the Secretary is considering to exercise his discretion to exclude 263 ac (106 ha) in Subunits 7a, 7b, 7c, and 7d that are within the Carlsbad HMP (which as stated earlier, includes the area covered by the Villages of La Costa HCP) under the MHCP (see Table 5 for the amount of land being considered for exclusion in each subunit).

Carlsbad Habitat Management Plan (Carlsbad HMP)

Brodiaea filifolia is a covered species under the Carlsbad HMP. Nine occurrences of *B. filifolia* exist within the City of Carlsbad. We have proposed four of these nine occurrences as critical habitat in Subunits 7a, 7b, 7c, and 7d. Under the HMP, all known occurrences of *B. filifolia* within existing preserve areas (7 of 9 known occurrences) will be

conserved at 100 percent. All covered activities impacting *B. filifolia* outside of already preserved areas are required to be consistent with the MHCP's narrow endemic policy, which requires mitigation for unavoidable impacts and management practices designed to achieve no net loss of narrow endemic populations, occupied acreage, or population viability within Focused Planning Areas. Additionally, cities cannot permit more than five percent gross cumulative loss of narrow endemic populations or occupied acreage within the Focused Planning Areas, and no more than 20 percent cumulative loss of narrow endemic locations, population numbers, or occupied acreage outside of Focused Planning Areas (AMEC 2003, pp. 2–14, D-1). All conserved populations of *B. filifolia* will be incorporated into the preserve areas of the HMP. The HMP includes provisions to manage the populations within the preserve areas in order to provide for the long-term conservation of the species.

Specific land use purposes are identified in the Carlsbad HMP. In each of the areas that we proposed as critical habitat, lands were mapped as Hardline Conservation Areas and Proposed Hardline Conservation Areas. These two categories of land use make up the areas within the Carlsbad HMP that are conserved or will be conserved as the plan is implemented. In Subunit 7a, Letterbox Canyon, 17 ac (7 ha) of the 57 ac (23 ha) of proposed critical habitat within the plan area are conserved or will be conserved under the HMP. In Subunit 7b, Rancho Carrillo, all 37 ac (15 ha) of the proposed critical habitat that are within the plan area are conserved or will be conserved under the HMP. In Subunit 7c, Calavera Hills Village H, 60 ac (24 ha) of the 71 ac (29 ha) of proposed critical habitat within the plan area are conserved or will be conserved under the HMP. In Subunit 7d, Rancho La Costa, 32 ac (13 ha) of the 98 ac (40 ha) of proposed critical habitat within the plan area are conserved or will be conserved under the HMP. Overall, of the 263 ac (106 ha) that we are considering for exclusion under section 4(b)(2) of the Act, 145 ac (59 ha) are conserved or will be conserved under the HMP.

At the time the Carlsbad HMP permit was issued (November 9, 2004), *Brodiaea filifolia* was a conditionally covered species under the HMP, as the proposed hard-lined reserve on the Fox-Miller property within Subunit 7a did not meet the conditions for coverage of the species under the HMP. The project was subsequently redesigned to meet the narrow endemic standards by impacting less than five percent of the known population, and a long-term management plan was submitted. On December 2, 2005, the Service and CDFG concluded that the City of Carlsbad would receive full coverage for *B. filifolia* under the HMP (CDFG and Service 2005, p. 1).

In summary, the Secretary is considering to exercise his discretion to exclude under section 4(b)(2) of the Act a total of 263 ac (106 ha) that meet the definition of critical habitat for *Brodiaea filifolia* within the Carlsbad HMP under the MHCP. The 1998 final listing rule for *B. filifolia* identified the following primary threats for this species: urbanization, alteration of hydrological conditions and channelization of drainages, discing for dry-land farming and fire suppression practices, OHV activity, grazing, drought, and competition from nonnative invasive plants (63 FR 54938; October 13, 1998, pp. 54983–54989). The Carlsbad HMP under the MHCP enacts conservation measures that minimize the impact of these threats on *B. filifolia*. We will analyze the benefits of inclusion and the benefits of exclusion of the areas covered by this subarea plan in the final revised critical habitat rule for *B. filifolia*. We encourage any public comment in relation to our consideration of the areas in Subunits 7a, 7b, 7c, and 7d for exclusion (see **Public Comments** section above).

Western Riverside County Multiple Species Habitat Conservation Plan (Western Riverside County MSHCP)

The Western Riverside County MSHCP is a large-scale, multi-jurisdictional HCP encompassing about 1.26 million ac (510,000 ha) in western Riverside County (Unit 11). The Western Riverside County MSHCP addresses 146 listed and unlisted ''covered species,'' including *Brodiaea filifolia*. Participants in the Western Riverside County MSHCP include 14 cities; the County of Riverside, including the Riverside County Flood Control and Water Conservation Agency (County Flood Control), Riverside County Transportation Commission, Riverside County Parks and Open Space District, and Riverside County Waste Department; CDPR; and the California Department of Transportation. The Western Riverside County MSHCP was designed to establish a multi-species conservation program that minimizes and mitigates the expected loss of habitat and the incidental take of covered species. The Service issued a single incidental take permit on June 22, 2004 (Service 2004b), under section 10(a)(1)(B) of the Act to 22 permittees under the Western Riverside County MSHCP for a period of 75 years. Specifically, the Secretary is considering to exercise his discretion to exclude 1,494 ac (605 ha) in Unit 11 (Subunits 11a–11f), of which we anticipate the majority will be conserved for *B. filifolia*, within the Western Riverside County MSHCP Plan Area (see Table 5 for the amount of land being considered for exclusion in each subunit).

The Western Riverside County MSHCP will establish approximately 153,000 ac (61,917 ha) of new conservation lands (Additional Reserve Lands) to complement the approximate 347,000 ac (140,426 ha) of pre-existing natural and open space areas (Public/Quasi-Public (PQP) lands). These PQP lands include those under Federal ownership, primarily managed by the USFS and BLM, and also permittee-owned or controlled open-space areas, primarily managed by the State and Riverside County. Collectively, the Additional Reserve Lands and PQP lands form the overall Western Riverside County MSHCP Conservation Area. The configuration of the 153,000 ac (61,916 ha) of Additional Reserve Lands is based on textual descriptions of habitat conservation necessary to meet the conservation goals for all covered species within the bounds of the approximately 310,000-ac (125,453-ha) Criteria Area. The Criteria Area is broken into criteria cells, and each cell has a description of conservation targets that will be achieved within that cell. This differs from some HCPs where the actual conservation area is mapped or ''hardlined'' during the planning stages. The interpretation of the textual descriptions, and therefore the creation of the actual conservation area, occurs over time as the implementation of the Western Riverside County MSHCP takes place. Each subunit has land in different mapping categories (some of which overlap) as they relate to different policies and review processes under the Western Riverside County MSHCP. The break-down for each subunit in terms of how much land is considered ''Public/Quasi Public,'' within the ''Criteria Area'', or in one of the ''Criteria Area Species Survey Areas'' (CASSA) is presented in Table 8.

TABLE 8. AREAS PROPOSED FOR CRITICAL HABITAT WITHIN THE WESTERN RIVERSIDE COUNTY MSHCP AND THE DIFFERENT CONSERVATION CATEGORIES REPRESENTED IN THE WESTERN RIVERSIDE COUNTY MSHCP (ACRES (AC) HECTARES (HA)).

Location	Public/Quasi Public Lands	Lands within the Criteria Area	Lands within the CASSA	Area considered for exclusion
11a. San Jacinto Wildlife Area	387 ac (157 ha)	86 ac (35 ha)	86 ac (35 ha) CASSA 3	401 ac (162 ha)
11b. San Jacinto Avenue/ Dawson Road	0 ac (0 ha)	117 ac (47 ha)	117 ac (47 ha) CASSA 3	117 ac (47 ha)
11c. Case Road	0 ac (0 ha)	179 ac (73 ha)	180 ac (73 ha) CASSA 3	180 ac (73 ha)
11d. Railroad Canyon	78 ac (32 ha)	202 ac (82 ha)	135 ac (55 ha) CASSA 3	257 ac (104 ha)
11e. Upper Salt Creek (Stowe Pool)	0 ac (0 ha)	145 ac (59 ha)	145 ac (59 ha) CASSA 3	145 ac (59 ha)
11f. Santa Rosa Plateau – Mesa de Colorado	221 ac (89 ha)	53 ac (21 ha)	53 ac (21 ha) CASSA 7	234 ac (95 ha)
11g. Santa Rosa Plateau - South of Tenaja Road	117 ac (47 ha)	0 ac (0 ha)	0 ac (0 ha)	117 ac (47 ha)
11h. Santa Rosa Plateau - North of Tenaja Road	44 ac (18 ha)	0 ac (0 ha)	0 ac (0 ha)	44 ac (18 ha)
Total[1]	846 ac (342 ha)	782 ac (316 ha)	715 ac (289 ha)	1,494 ac (605 ha)

[1] Values in this table may not sum due to rounding.

The Western Riverside County MSHCP identifies five conservation objectives that will be implemented to provide long-term conservation of *Brodiaea filifolia*: (1) Include within the MSHCP Conservation Area at least 6,900 ac (2,792 ha) of grassland and playa/ vernal pool habitat within the San Jacinto River, Mystic Lake, and Salt Creek areas; (2) include within the Western Riverside County MSHCP Conservation Area at least 11 major locations supporting *B. filifolia* in two core areas along the San Jacinto River and on the Santa Rosa Plateau; (3) conduct surveys for the species in certain areas of suitable habitat until the conservation goals are met (in accordance with the ''Additional Survey Needs and Procedures'' policy within the CASSA, which includes avoidance of 90 percent of portions of property with long-term conservation value until the species conservation objectives are met); (4) include within the Western Riverside County MSHCP Conservation Area the floodplain along the San Jacinto River to maintain floodplain processes along the San Jacinto River; and (5) include within the MSHCP Conservation Area the floodplain along Salt Creek from Warren Road to Newport Road, and the vernal pools in Upper Salt Creek west of Hemet (Dudek and Associates, Inc. 2003, pp. P-435–P-446; Service 2004b, pp. 383-384). Additionally, the Western Riverside County MSHCP requires surveys to be conducted for *B. filifolia* within the MSHCP Conservation Area at least every 8 years to verify occupancy at a minimum 75 percent of the known locations. Management measures will be triggered, as appropriate, if a decline in species distribution is documented below this threshold. Other management actions will help maintain habitat and populations of *B. filifolia* by preventing alteration of hydrology and floodplain dynamics, OHV use, grazing, and competition from nonnative invasive plants.

The goal of conserving 6,900 ac (2,792 ha) of occupied or suitable habitat for *Brodiaea filifolia* in the MSHCP Conservation Area can be attained through acquisition or other dedications of land assembled from within the Criteria Area (i.e., the Additional Reserve Lands) or Narrow Endemic Plan Species Survey Area, and through coordinated management of existing PQP lands. We internally mapped a ''Conceptual Reserve Design,'' that illustrates existing PQP lands and predicts the geographic distribution of the Additional Reserve Lands based on our interpretation of the textual descriptions of habitat conservation necessary to meet conservation goals. Our Conceptual Reserve Design was intended to predict one possible future configuration of the eventual approximately 153,000 ac (61,916 ha) of Additional Reserve Lands in conjunction with the existing PQP lands, including approximately 6,900 ac (2,792 ha) of ''suitable'' *B. filifolia* habitat, that will be conserved to meet the goals and objectives of the plan (Service 2004b, p. 73).

Preservation and management of approximately 6,900 ac (2,792 ha) of *Brodiaea filifolia* habitat under the Western Riverside County MSHCP will contribute to conservation and ultimate recovery of this species. *Brodiaea filifolia* is threatened primarily by agricultural activities, development, and fuel modification actions to prevent wildfire within the area the plan covers (Service 2004b, pp. 378–386). The Western Riverside County MSHCP will remove and reduce threats to this species and the physical and biological features essential to its conservation as the plan is implemented by placing large blocks of occupied and unoccupied habitat into preservation throughout the Conservation Area. Areas identified for preservation and conservation include known locations of the species along the San Jacinto River, Mystic Lake, and Salt Creek portions of the MSHCP Conservation Area. Specific areas targeted for conservation include occurrences along Goetz Road, Perris Valley airport, Tenaja Road, Mesa de Colorado, Hemet vernal pools, South SJWA, Squaw Mountain, Santa Rosa ranch, Slaughterhouse, North SJWA, and Redondo Mesa.

The Western Riverside County MSHCP Conservation Area will

maintain floodplain processes along the San Jacinto River and along Salt Creek to provide for the distribution of *Brodiaea filifolia* to shift over time as hydrologic conditions and seed bank sources change. As described above, surveys for *B. filifolia* will be conducted in certain areas of suitable habitat until the conservation goals are met (in accordance with the ''Additional Survey Needs and Procedures'' policy within CASSA. The CASSA area includes potential habitat for *B. filifolia*; thus, focused surveys are required for this species. Conservation within this area includes avoidance of 90 percent of portions of property with long-term conservation value until the species conservation objectives of the Western Riverside County MSHCP are met. Additionally, policies such as the Riparian/Riverine and Vernal Pool Policy (Dudek and Associates, Inc. 2003, pp. 6-20–6-27) provide additional conservation requirements.

The Western Riverside County MSHCP incorporates several processes that allow for Service oversight and participation in program implementation. These processes include: (1) Consultation with the Service on a long-term management and monitoring plan; (2) submission of annual monitoring reports; (3) annual status meetings with the Service; and (4) submission of annual implementation reports to the Service (Service 2004b, p. 9–10). Below we provide a brief analysis of the lands in Unit 11 that the Secretary is considering to exercise his discretion to exclude and how this area is covered by the Western Riverside County MSHCP or other conservation measures.

The Western Riverside County MSHCP has several measures in place to ensure the plan is implemented in a way that conserves *Brodiaea filifolia* in accordance with the species-specific criteria and objectives for this species. In the areas we propose as critical habitat, we expect the Western Riverside County MSHCP will adequately conserve this species or provide for biologically equivalent conservation in an equally suitable area. We are proposing six subunits within Unit 11, all of which are within the boundaries of the Western Riverside County MSHCP.

Lands already in permanent conservation include a portion of lands in Subunits 11a, 11d, 11f, 11g, 11h. For example, subunit 11f is within the Santa Rosa Plateau Ecological Reserve. This Reserve has four landowners: CDFG, the County of Riverside, the Metropolitan Water District of Southern California, and The Nature Conservancy. The landowners and the Service (which owns no land on the Plateau) signed a cooperative management agreement on April 16, 1991 (Dangermond and Associates, Inc. 1991), and meet regularly to work on the management of the Reserve (Riverside County Parks 2009, p. 2). The vernal pools within Subunit 11f are managed and monitored to preserve the unique vernal pool plants and animals that occur on the Santa Rosa Plateau, including Mesa de Colorado.

Approximately 96 percent of Subunit 11a (385 ac (156 ha)) is within the San Jacinto Wildlife Area, a wildlife area owned and operated by the CDFG. This area consists of restored wetlands that provide habitat for waterfowl and wading birds, as well as seasonally flooded vernal plain habitat along the San Jacinto River north of the Ramona Expressway that supports *Brodiaea filifolia*. The Service regularly works with CDFG to ensure that the seasonally flooded alkali vernal plain habitat at the San Jacinto Wildlife Area continues to function and provide a benefit to *B. filifolia* and other sensitive species that use this habitat. In addition to the portion of Subunit 11a owned by CDFG, 84 ac (34 ha) of the remaining land is within the Criteria Area.

Subunits 11b, 11c, 11e, and the remainder of the other subunits not discussed above are not conserved at this time. These subunits have protections in place from past conservation efforts, through various HCP requirements (such as the ''Additional Survey Needs and Procedures'' policy within the CASSA), or because they are within the Criteria Area. Projects in the Criteria Area will be implemented through the Joint Project Review Process to ensure that the requirements of the MSHCP permit and the Implementing Agreement are properly met (Western Riverside County MSHCP, Volume 1, section 6.6.2 in Dudek and Associates, Inc. 2003, p. 6-82).

In summary, the Secretary is considering to exercise his discretion to exclude 1,494 ac (605 ha) of proposed critical habitat for *Brodiaea filifolia* on permittee-owned or controlled lands in Subunits 11a, 11b, 11c, 11d, 11e, 11f, 11g, and 11h that meet the definition of critical habitat for *B. filifolia* within the Western Riverside County MSHCP under section 4(b)(2) of the Act. The 1998 final listing rule for *B. filifolia* identified the following primary threats to *B. filifolia*: habitat destruction and fragmentation from urban and agricultural development, pipeline construction, road construction, alteration of hydrology and floodplain dynamics, excessive flooding, channelization, OHV activity, trampling by cattle and sheep, weed abatement, fire suppression practices (including discing and plowing), and competition from nonnative invasive plant species (63 FR 54938; October 13, 1998). The implementation of the Western Riverside County MSHCP helps to address these threats through a regional planning effort rather than through a project-by-project approach and outlines species-specific objectives and criteria for the conservation of *B. filifolia*. In the final revised critical habitat rule for *B. filifolia*, we will analyze the benefits of inclusion and exclusion of this area from critical habitat under section 4(b)(2) of the Act. We encourage any public comment in relation to our consideration of the areas in Subunits 11a, 11b, 11c, 11d, 11e, 11f, 11f, 11g, and 11h for exclusion (see **Public Comments** section above).

San Diego Multiple Species Conservation Program (MSCP) – City and County of San Diego Subarea Plans

The MSCP is a subregional HCP made up of several subarea plans that has been in place for more than a decade. The subregional plan area encompasses approximately 582,243 ac (235,626 ha) (County of San Diego 1997, p. 1–1; MSCP 1998, pp. 2–1, and 4–2 to 4–4) and provides for conservation of 85 federally listed and sensitive species (''covered species'') through the establishment and management of approximately 171,920 ac (69,574 ha) of preserve lands within the Multi-Habitat Planning Area (MHPA) (City of San Diego) and Pre-Approved Mitigation Areas (PAMA) (County of San Diego). The MSCP was developed in support of applications for incidental take permits for several federally listed species by 12 participating jurisdictions and many other stakeholders in southwestern San Diego County. Under the umbrella of the MSCP, each of the 12 participating jurisdictions is required to prepare a subarea plan that implements the goals of the MSCP within that particular jurisdiction. *Brodiaea filifolia* was evaluated in the City and County of San Diego Subarea Plans under the MSCP. The Service issued an incidental take permit to the City of San Diego on July 18, 1997 (Service 1997), and to the County of San Diego on March 17, 1998 (Service 1998), under section 10(a)(1)(B) of the Act; each permit is for a period of 50 years. Specifically, the Secretary is considering to exercise his discretion to exclude 109 ac (44 ha) in Unit 12 that are within the City and County of San Diego Subarea Plans.

Upon completion of preserve assembly, approximately 171,920 ac

(69,574 ha) of the 582,243-ac (235,626-ha) MSCP plan area will be preserved (MSCP 1998, pp. 2–1 and 4–2 to 4–4). City and County of San Diego Subarea Plans identify areas where mitigation activities should be focused to assemble preserve areas in the MHPA and the PAMA. When the preserve is completed, the public sector (i.e., Federal, State, and local government, and general public) will have contributed 108,750 ac (44,010 ha) (63.3 percent) to the preserve, of which 81,750 ac (33,083 ha) (48 percent) was existing public land when the MSCP was established and 27,000 ac (10,927 ha) (16 percent) will have been acquired. At completion, the private sector will have contributed 63,170 ac (25,564 ha) (37 percent) to the preserve as part of the development process, either through avoidance of impacts or as compensatory mitigation for impacts to biological resources outside the preserve. Currently and in the future, Federal and State governments, local jurisdictions and special districts, and managers of privately owned lands will manage and monitor their lands in the preserve for species and habitat protection (MSCP 1998, pp. 2-1 and 4–2 to 4–4).

Private lands within the PAMA and MHPA are subject to special restrictions on development, and lands that are dedicated to the preserve must be legally protected and permanently managed to conserve the covered species. Public lands owned by the County, State of California, and the Federal government that are identified for conservation under the MSCP must also be protected and permanently managed to protect the covered species. Specifically, *Brodiaea filifolia* is only known to occur in the areas proposed as Unit 12 within the City and County of San Diego Subarea Plans and those areas are being conserved under the plans.

Numerous processes are incorporated into the MSCP that allow our oversight of the MSCP implementation. For example, the MSCP imposes annual reporting requirements and provides for our review and approval of proposed subarea plan amendments and preserve boundary adjustments and for Service review and comment on projects during the California Environmental Quality Act review process. We also chair the MSCP Habitat Management Technical Committee and the Monitoring Subcommittee (MSCP 1998, pp. 5–11 to 5–23). Each MSCP subarea plan must account annually for the progress it is making in assembling conservation areas. We must receive annual reports that include, both cumulatively and by project, the habitat acreage destroyed and conserved within the subareas. This accounting process ensures that habitat conservation proceeds in rough proportion to habitat loss and in compliance with the MSCP subarea plans and the plans' associated implementing agreements.

In summary, the Secretary is considering to exercise his discretion to exclude 109 ac (44 ha) that meet the definition of critical habitat for *Brodiaea filifolia* within the City and County of San Diego Subarea Plans under the San Diego MSCP under section 4(b)(2) of the Act. The 1998 final listing rule for *B. filifolia* identified the following primary threats to *B. filifolia*: habitat destruction and fragmentation from urban and agricultural development, pipeline construction, road construction, alteration of hydrology and flood plain dynamics, excessive flooding, channelization, OHV activity, trampling by cattle and sheep, weed abatement, fire suppression practices (including discing and plowing), and competition from nonnative invasive plant species (63 FR 54938; October 13, 1998). The implementation of the City and County of San Diego Subarea Plans under the San Diego MSCP helps to address these threats through a regional planning effort rather than through a project-by-project approach, and outlines species-specific objectives and criteria for the conservation of *B. filifolia*. We will analyze the benefits of inclusion and exclusion of this area from critical habitat under section 4(b)(2) of the Act. We encourage any public comment in relation to our consideration of the areas in Unit 12 for exclusion (see **Public Comments** section above).

Peer Review

In accordance with our joint policy published in the **Federal Register** on July 1, 1994 (59 FR 34270), we are obtaining the expert opinions of at least three appropriate independent specialists regarding this proposed rule. The purpose of peer review is to ensure that our critical habitat designation is based on scientifically sound data, assumptions, and analyses. We will invite these peer reviewers to comment during this public comment period on our specific assumptions and conclusions in this proposed revised designation of critical habitat. We will consider all comments and information we receive during this comment period on this proposed rule during our preparation of a final determination. Accordingly, our final decision may differ from this proposal.

Public Hearings

Section 4(b)(5) of the Act provides for one or more public hearings on this proposal, if we receive any requests for hearings. We must receive your request for a public hearing within 45 days after the date of this **Federal Register** publication. Send your request to Jim Bartel, Field Supervisor of the Carlsbad Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT** section). We will schedule public hearings on this proposal, if any are requested, and announce the dates, times, and places of those hearings, as well as how to obtain reasonable accommodations, in the **Federal Register** and local newspapers at least 15 days before the first hearing.

Required Determinations

Regulatory Planning and Review – Executive Order 12866

The Office of Management and Budget (OMB) has determined that this rule is not significant and has not reviewed this proposed rule under Executive Order 12866 (E.O. 12866). OMB bases its determination upon the following four criteria:

(1) Whether the rule will have an annual effect of $100 million or more on the economy or adversely affect an economic sector, productivity, jobs, the environment, or other units of the government.

(2) Whether the rule will create inconsistencies with other Federal agencies' actions.

(3) Whether the rule will materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.

(4) Whether the rule raises novel legal or policy issues.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency must publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency certifies the rule will not have a significant economic impact on a substantial number of small entities. SBREFA amended the RFA to require Federal agencies to provide a statement of factual basis for certifying that the rule will not have a significant

economic impact on a substantial number of small entities.

An analysis of the economic impacts of the 2004 proposed critical habitat designation was made available to the public on October 6, 2005 (70 FR 58361), and finalized for the final rule to designate critical habitat for *Brodiaea filifolia* as published in the **Federal Register** on December 13, 2005 (70 FR 58361). The costs associated with critical habitat for *B. filifolia*, across the entire area considered for designation (across designated and excluded areas), were primarily due to mitigation and other conservation costs that may be required for real estate development projects. After excluding land in Riverside and San Diego Counties from the proposed critical habitat, the economic impact was estimated to be between $12.2 and $14.7 million (on a present/2005 value basis) or $12.2 to $16.9 million in undiscounted dollars (an annualized cost of $0.6 to $0.8 million annually) over the next 20 years. Based on the 2005 economic analysis, we concluded that the designation of critical habitat for *B. filifolia*, as proposed in 2004, would not result in significant small business impacts. This analysis is presented in the notice of availability for the economic analysis as published in the **Federal Register** on October 6, 2005 (70 FR 58361).

We are preparing a new analysis of the economic impacts of this proposed revision to critical habitat for *Brodiaea filifolia*. At this time, we lack current economic information necessary to provide an updated factual basis for the required RFA finding with regard to this proposed revision to critical habitat. Therefore, we defer the RFA finding until completion of the draft economic analysis prepared under section 4(b)(2) of the Act and E.O. 12866. The draft economic analysis will provide the required factual basis for the RFA finding. Upon completion of the draft economic analysis, we will announce its availability in the **Federal Register** and reopen the public comment period for the proposed designation. We will include with this announcement, as appropriate, an initial regulatory flexibility analysis or a certification that the rule will not have a significant economic impact on a substantial number of small entities accompanied by the factual basis for that determination. We concluded that deferring the RFA finding until completion of the draft economic analysis is necessary to meet the purposes and requirements of the RFA. Deferring the RFA finding in this manner will ensure that we make a sufficiently informed determination based on adequate economic information and provide the necessary opportunity for public comment.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act, we make the following findings:

(1) This rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or Tribal governments, or the private sector, and includes both ''Federal intergovernmental mandates'' and ''Federal private sector mandates.'' These terms are defined in 2 U.S.C. 658(5) – (7). ''Federal intergovernmental mandate'' includes a regulation that ''would impose an enforceable duty upon State, local, or [T]ribal governments,'' with two exceptions. It excludes ''a condition of Federal assistance.'' It also excludes ''a duty arising from participation in a voluntary Federal program,'' unless the regulation ''relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and [T]ribal governments under entitlement authority,'' if the provision would ''increase the stringency of conditions of assistance'' or ''place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding,'' and the State, local, or Tribal governments ''lack authority'' to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; AFDC work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. ''Federal private sector mandate'' includes a regulation that ''would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program.''

The designation of critical habitat does not impose a legally binding duty on non-Federal Government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. While non-Federal entities that receive Federal funding, assistance, permits, or otherwise require approval or authorization from a Federal agency for an action may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply, nor would critical habitat shift the costs of the large entitlement programs listed above onto State governments.

(2) Based in part on an analysis conducted for the previous designation of critical habitat and extrapolated to this designation, we do not expect this rule to significantly or uniquely affect small governments. Small governments will be affected only to the extent that if any of their programs or activities involve Federal funds, permits, or other authorizations, the Federal action agencies must ensure that their actions are not likely to destroy or adversely modify the critical habitat. Therefore, a Small Government Agency Plan is not required. However, as we conduct our economic analysis for the revised rule, we will further evaluate this issue and revise this assessment if appropriate.

Takings – Executive Order 12630

In accordance with E.O. 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we have analyzed the potential takings implications of designating critical habitat for *Brodiaea filifolia* in a takings implications assessment. The takings implications assessment concludes that this designation of critical habitat for *B. filifolia* does not pose significant takings implications for lands within or affected by the designation.

Federalism – Executive Order 13132

In accordance with E.O. 13132 (Federalism), this proposed rule does not have significant Federalism effects. A Federalism assessment is not required. In keeping with Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of, this proposed critical habitat designation with appropriate State resource agencies in California. The designation may have some benefit to these governments because the areas that contain the features essential to the conservation of the species are more clearly defined, and the primary constituent elements of the habitat necessary to the conservation of the species are specifically identified. This information does not alter where and

what federally sponsored activities may occur. However, it may assist these local governments in long-range planning (because these local governments no longer have to wait for case-by-case section 7 consultations to occur).

Where State and local governments require approval or authorization from a Federal agency for actions that may affect critical habitat, consultation under section 7(a)(2) would be required. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency.

Civil Justice Reform – Executive Order 12988

In accordance with Executive Order 12988 (Civil Justice Reform), it has been determined that the rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order. We have proposed to revise critical habitat in accordance with the provisions of the Act. This proposed rule uses standard property descriptions and identifies the primary constituent elements within the designated areas to assist the public in understanding the habitat needs of *Brodiaea filifolia*.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

This rule does not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act (NEPA) (42 U.S.C. 4321 et seq.)

It is our position that, outside the jurisdiction of the U.S. Court of Appeals for the Tenth Circuit, we do not need to prepare environmental analyses as defined by NEPA (42 U.S.C. 4321 *et seq.*) in connection with designating critical habitat under the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This position was upheld by the U.S. Court of Appeals for the Ninth Circuit (*Douglas County* v. *Babbitt*, 48 F.3d 1495 (9th Cir. 1995), cert. denied 516 U.S. 1042 (1996)).

Clarity of the Rule

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(1) Be logically organized;

(2) Use the active voice to address readers directly;

(3) Use clear language rather than jargon;

(4) Be divided into short sections and sentences; and

(5) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the **ADDRESSES** section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

Government-to-Government Relationship with Tribes

In accordance with the President's memorandum of April 29, 1994, Government-to-Government Relations with Native American Tribal Governments (59 FR 22951), E.O. 13175, and the Department of the Interior's manual at 512 DM 2, we have a responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with Tribes in developing programs for healthy ecosystems, to acknowledge that tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to Tribes.

We determined that there are no tribal lands meeting the definition of critical habitat for *Brodiaea filifolia*. Therefore, critical habitat for *B. filifolia* is not being proposed on tribal lands. We will continue to coordinate with tribal governments as applicable during the designation process.

Energy Supply, Distribution, or Use – Executive Order 13211

On May 18, 2001, the President issued an Executive Order (E.O. 13211; Actions Significantly Affect Energy Supply, Distribution, or Use) on regulations that significantly affect energy supply, distribution, and use. E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. Based on an analysis conducted for the previous designation of critical habitat and extrapolated to this designation, along with a further analysis of the additional areas included in this revision, we determined that this proposed rule to designate critical habitat for *Brodiaea filifolia* is not expected to significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required. However, we will further evaluate this issue as we conduct our economic analysis, and review and revise this assessment as warranted.

References Cited

A complete list of all references cited in this rulemaking is available on *http://www.regulations.gov* and upon request from the Field Supervisor, Carlsbad Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT** section).

Author(s)

The primary author of this proposed rule is the staff from the Carlsbad Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT** section).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Proposed Regulation Promulgation

Accordingly, we propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—[AMENDED]

1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

2. In § 17.12(h), revise the entry for *''Brodiaea filifolia''* under ''Flowering Plants'' to read as follows:

§ 17.12 Endangered and threatened plants.

* * * * *

(h) * * *

SPECIES		Historic Range	Family	Status	When Listed	Critical Habitat	Special Rules
Scientific Name	Common Name						
Flowering Plants							
*	*	*	*	*	*	*	
Brodiaea filifolia	thread-leaved brodiaea	U.S.A. (CA)	Themidaceae – Cluster Lily	T	650	17.96(a)	NA
*	*	*	*	*	*	*	

3. Amend § 17.96(a) by:

a. Removing the entry for ''*Brodiaea filifolia* (thread-leaved brodiaea)'' under Family Liliaceae; and

b. Adding a new entry for *''Brodiaea filifolia* (thread-leaved brodiaea)'' under Family Themidaceae in alphabetic order by family name to read as follows:

§ 17.96 Critical habitat—plants.

(a) *Flowering plants.*

* * * * *

Family Themidaceae: *Brodiaea filifolia* (thread-leaved brodiaea)

(1) Critical habitat units are depicted for Los Angeles, San Bernardino, Riverside, Orange, and San Diego Counties, California, on the maps below.

(2) Within these areas, the primary constituent elements for *Brodiaea filifolia* consist of two components:

(i) Appropriate soil series at a range of elevations and in a variety of plant communities, specifically:

(A) Clay soil series of various origins (such as Alo, Altamont, Auld, or Diablo), clay lenses found as unmapped inclusions in other soils series, or loamy soils series underlain by a clay subsoil (such as Fallbrook, Huerhuero, or Las Flores) occurring between the elevations of 100 and 2,500 ft (30 and 762 m).

(B) Soils (such as Cieneba-rock outcrop complex and Ramona family-Typic Xerothents soils) altered by hydrothermal activity occurring between the elevations of 1,000 and 2,500 ft (305 and 762 m).

(C) Silty loam soil series underlain by a clay subsoil or caliche that are generally poorly drained, moderately to strongly alkaline, granitic in origin (such as Domino, Grangeville, Traver, Waukena, or Willows) occurring between the elevations of 600 and 1,800 ft (183 and 549 m).

(D) Clay loam soil series (such as Murrieta) underlain by heavy clay loams or clays derived from olivine basalt lava flows occurring between the elevations of 1,700 and 2,500 ft (518 and 762 m).

(E) Sandy loam soils derived from basalt and granodiorite parent materials; deposits of gravel, cobble, and boulders; or hydrologically fractured, weathered granite in intermittent streams and seeps occurring between 1,800 and 2,500 ft (549 and 762 m).

(ii) Areas with a natural, generally intact surface and subsurface soil structure, not permanently altered by anthropogenic land use activities (such as deep, repetitive discing, or grading) extending out up to 820 ft (250 m) from mapped occurrences of *Brodiaea filifolia*.

(3) Critical habitat does not include manmade structures existing on the effective date of this rule and not containing one or more of the primary constituent elements, such as buildings, aqueducts, airports, and roads, and the land on which such structures are located.

(4) *Critical habitat map units.* Data layers defining map units were created using a base of U.S. Geological Survey 7.5' quadrangle maps. Critical habitat units were then mapped using Universal Transverse Mercator (UTM) zone 11, North American Datum (NAD) 1983 coordinates.

(5) *Note*: Index Map of critical habitat units for *Brodiaea filifolia* (thread-leaved brodiaea) follows:

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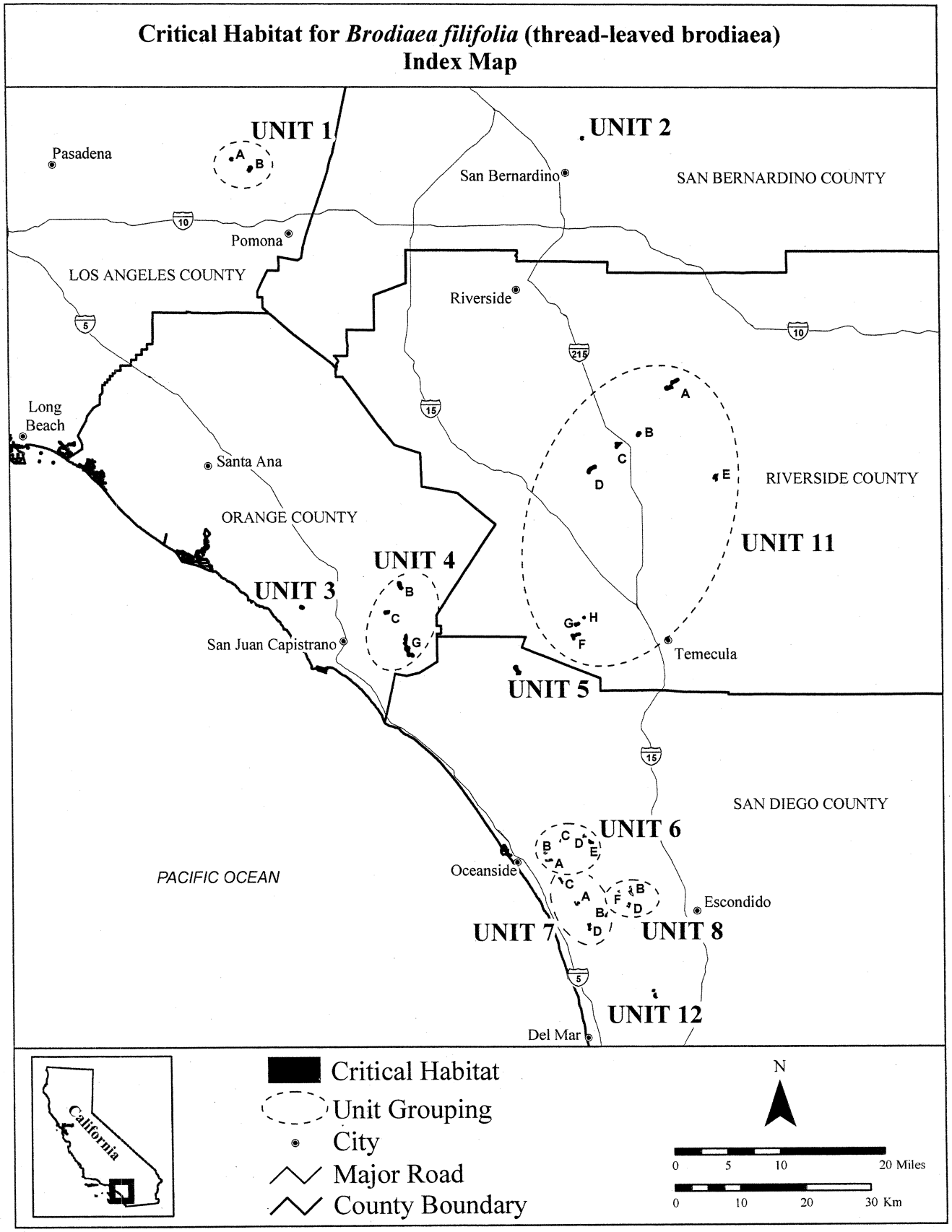
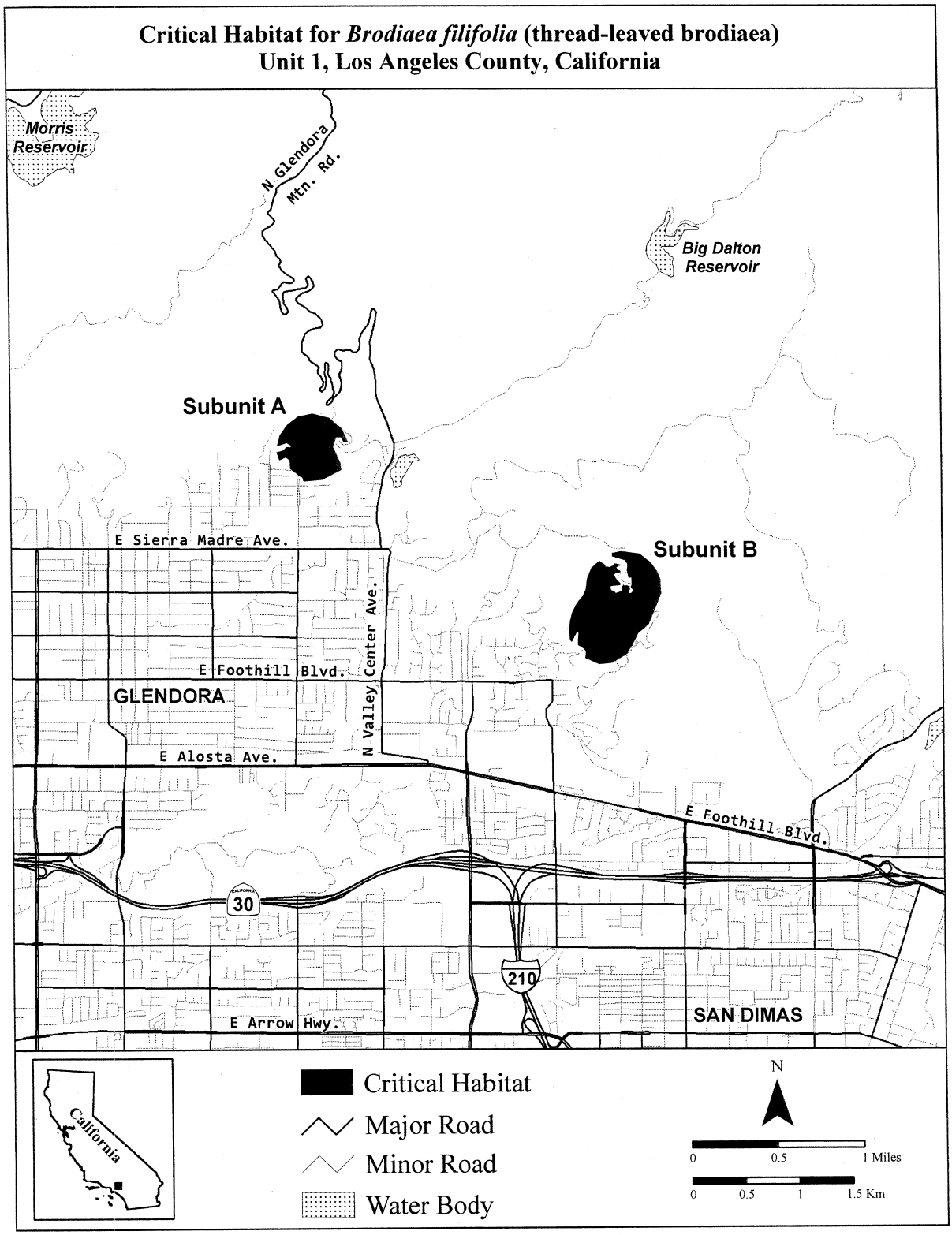

Critical Habitat for *Brodiaea filifolia* (thread-leaved brodiaea)
Index Map
UNIT 1
UNIT 2
Pasadena
San Bernardino
SAN BERNARDINO COUNTY
Pomona
LOS ANGELES COUNTY
Riverside
Long Beach
Santa Ana
ORANGE COUNTY
RIVERSIDE COUNTY
UNIT 11
UNIT 4
UNIT 3
San Juan Capistrano
Temecula
UNIT 5
SAN DIEGO COUNTY
UNIT 6
PACIFIC OCEAN
Oceanside
Escondido
UNIT 7
UNIT 8
UNIT 12
Del Mar
California
Critical Habitat
Unit Grouping
City
Major Road
County Boundary
N
0 5 10 20 Miles
0 10 20 30 Km

(6) Unit 1: Los Angeles County.

(i) Subunit 1a, Glendora [*Description of unit location to be inserted here.*]

(ii) Subunit 1b, San Dimas. [*Description of unit location to be inserted here.*]

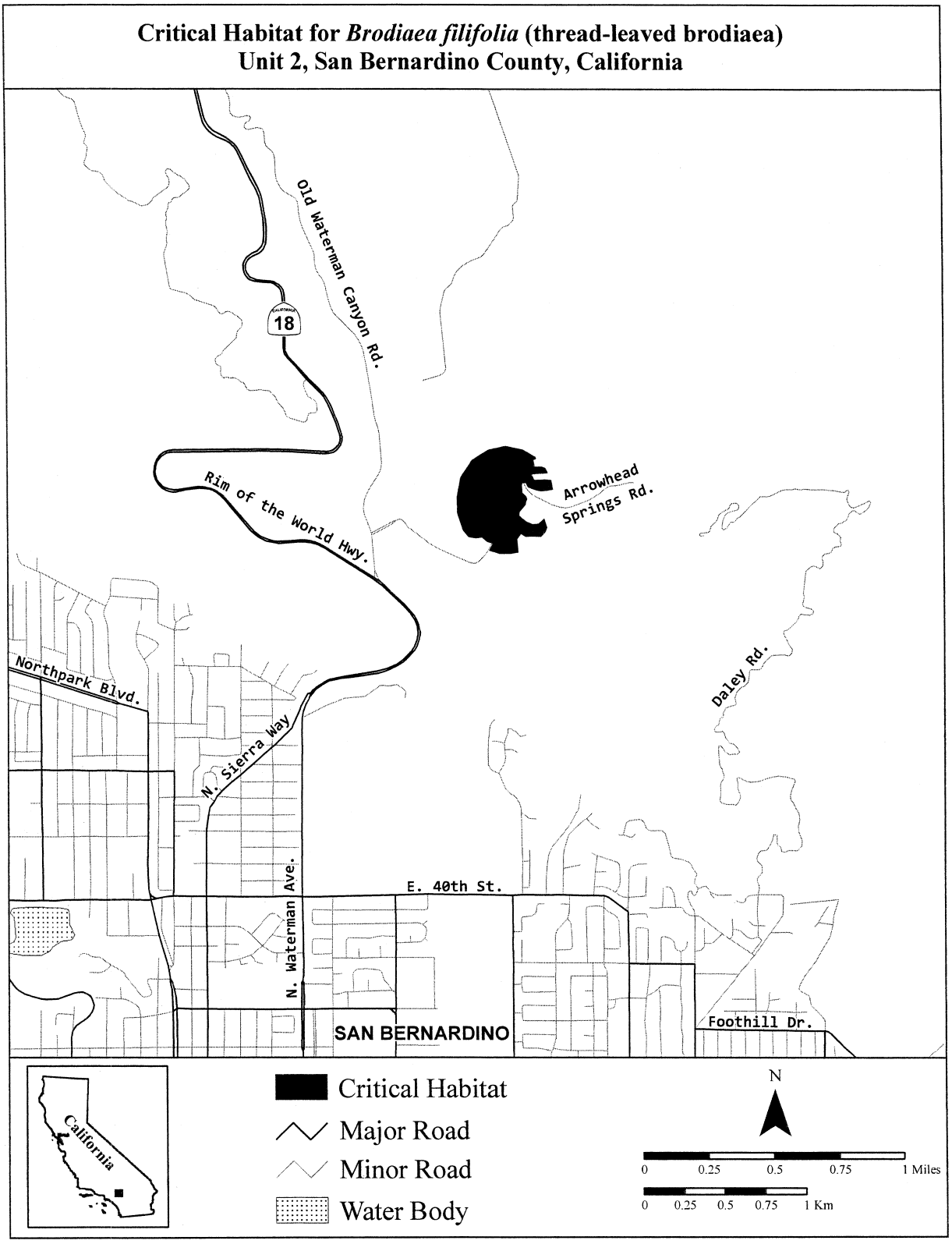
(iii) *Note*: Map of Unit 1, Subunits 1a and 1b, follows:



(7) Unit 2: San Bernardino County.

(i) [*Description of unit location to be inserted here.*]

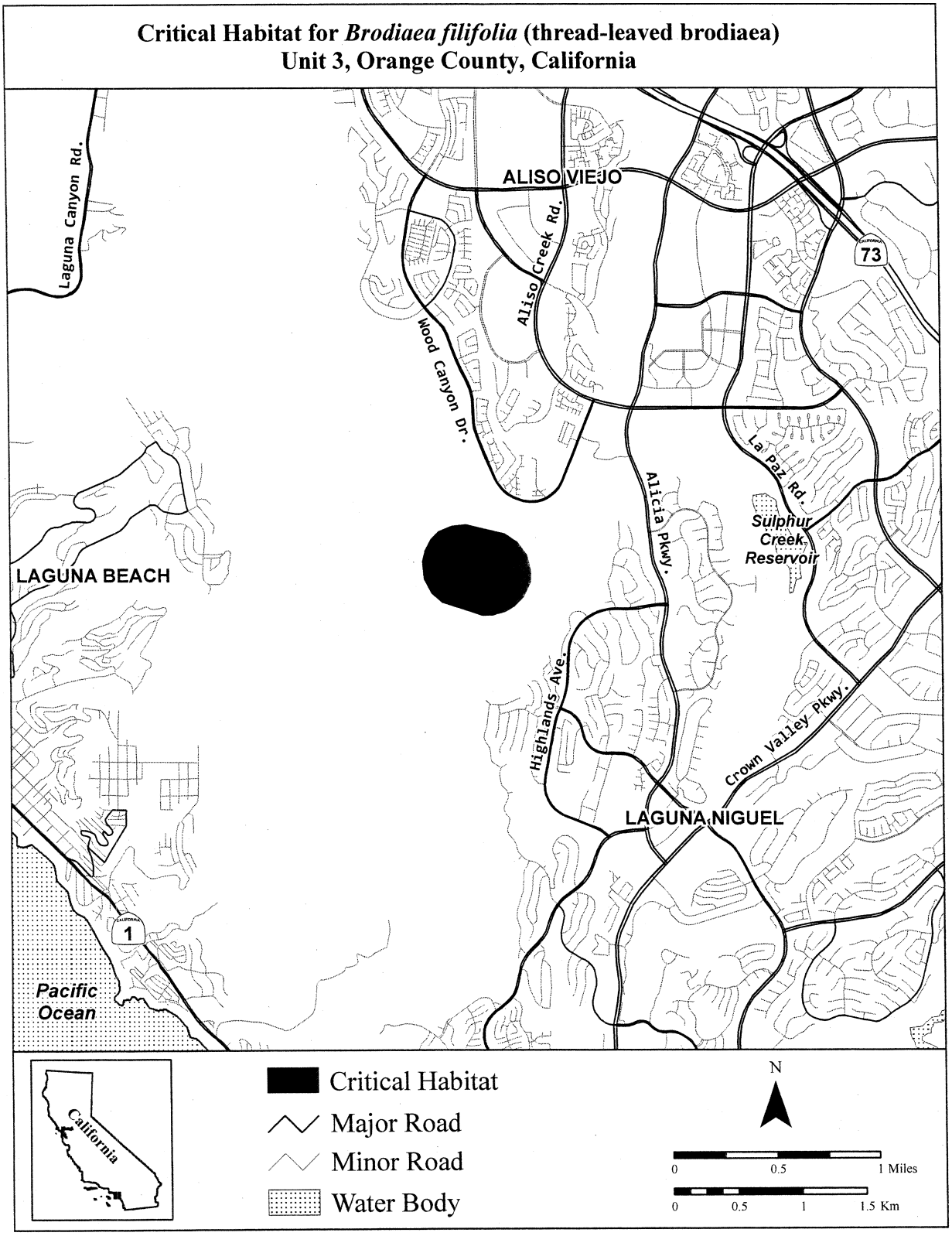
(ii) *Note*: Map of Unit 2 follows:



(8) Unit 3: Central Orange County.

(i) [*Description of unit location to be inserted here.*]

(ii) *Note*: Map of Unit 3 follows:



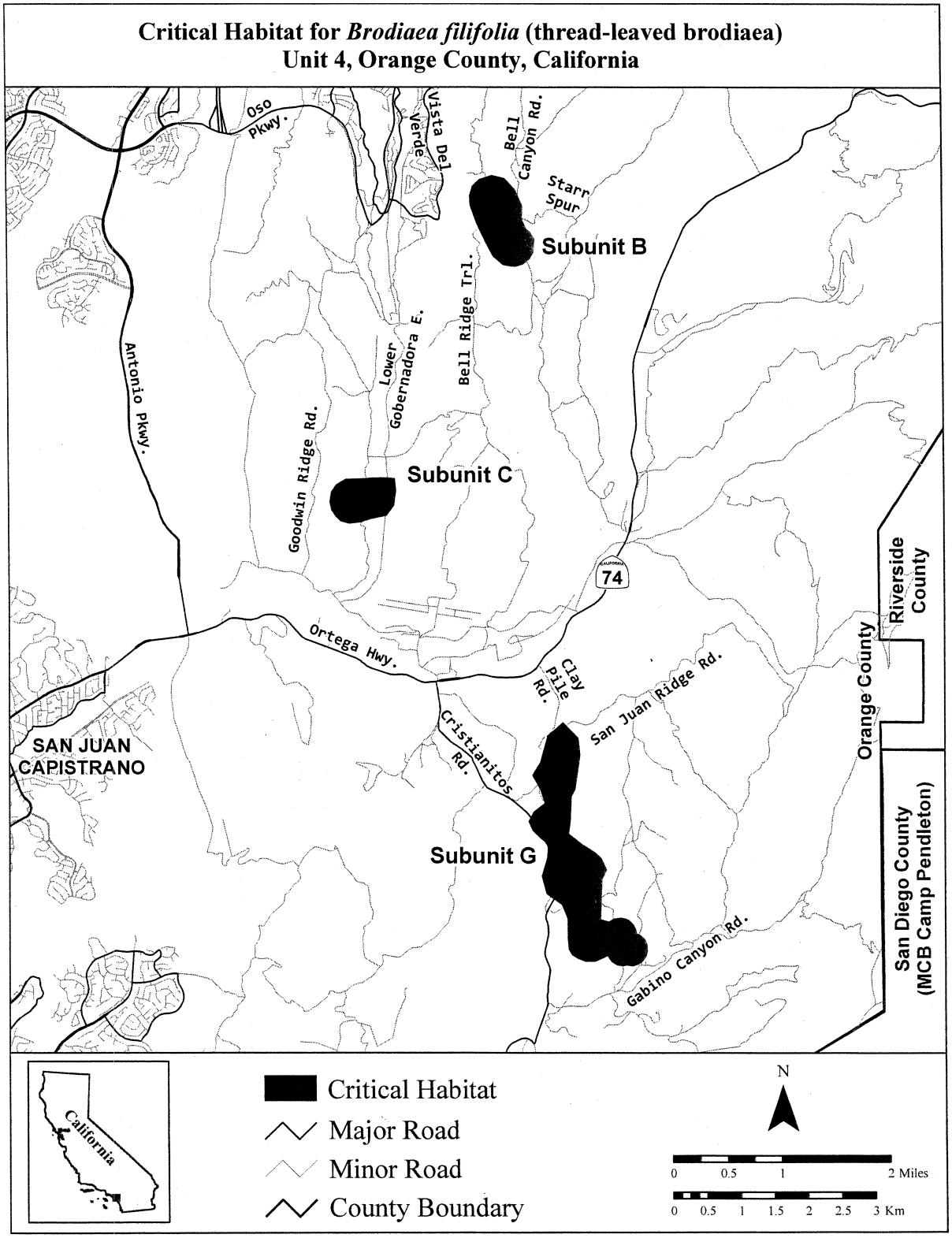
(9) Unit 4: Southern Orange County.

(i) Subunit 4b, Caspers Wilderness Park. [*Description of unit location to be inserted here.*]

(ii) Subunit 4c, Cañada Governadora/Chiquita Ridgeline. [*Description of unit location to be inserted here.*]

(iii) Subunit 4g, Christianitos Canyon. [*Description of unit location to be inserted here.*]

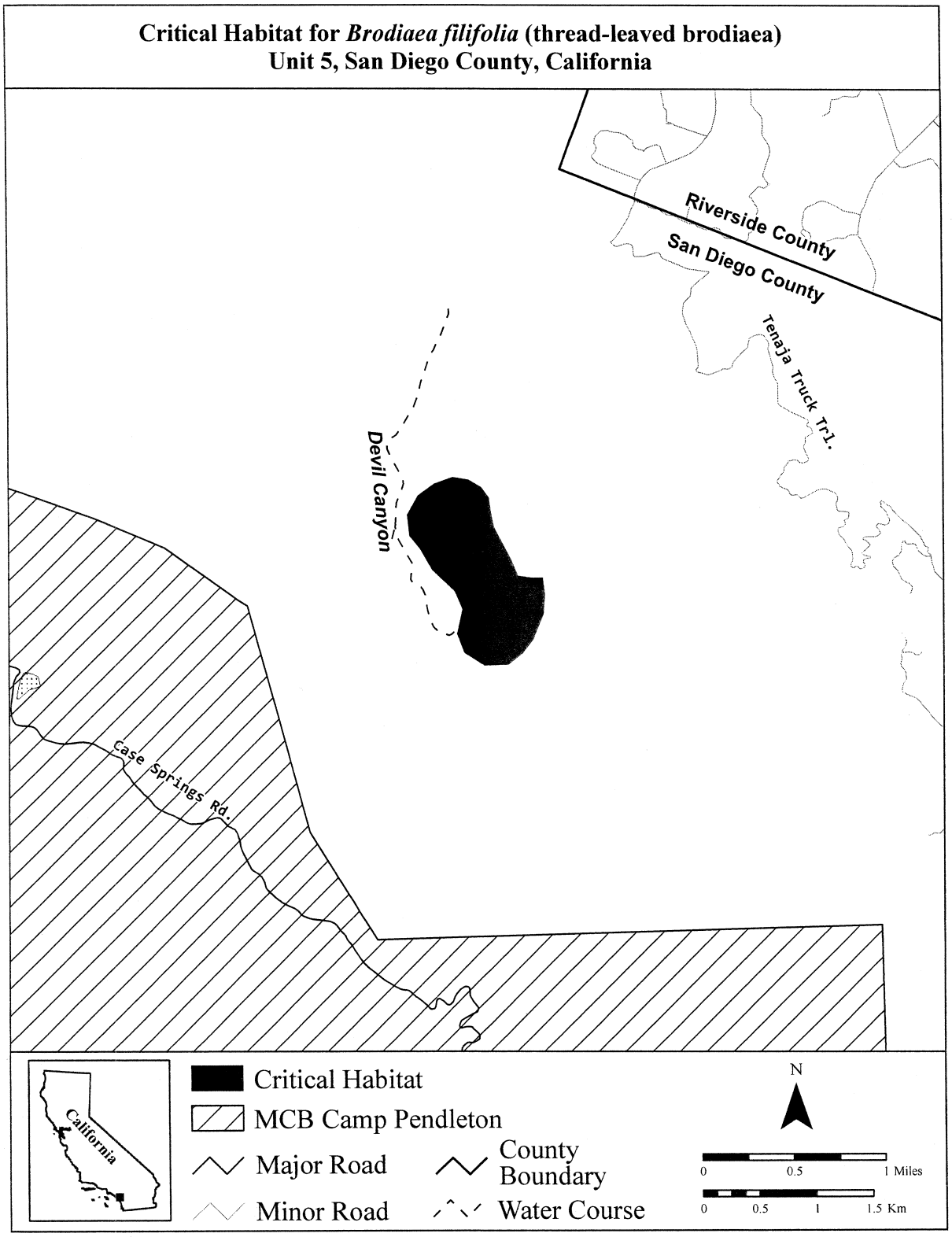
(iv) *Note*: Map of Unit 4 follows:



(10) Unit 5: Northern San Diego County.

(i) Subunit 5b, Devil Canyon. [*Description of unit location to be inserted here.*]

(ii) *Note*: Map of Unit 5 follows:



(11) Unit 6: Oceanside.

(i) Subunit 6a, Alta Creek. [*Description of unit location to be inserted here.*]

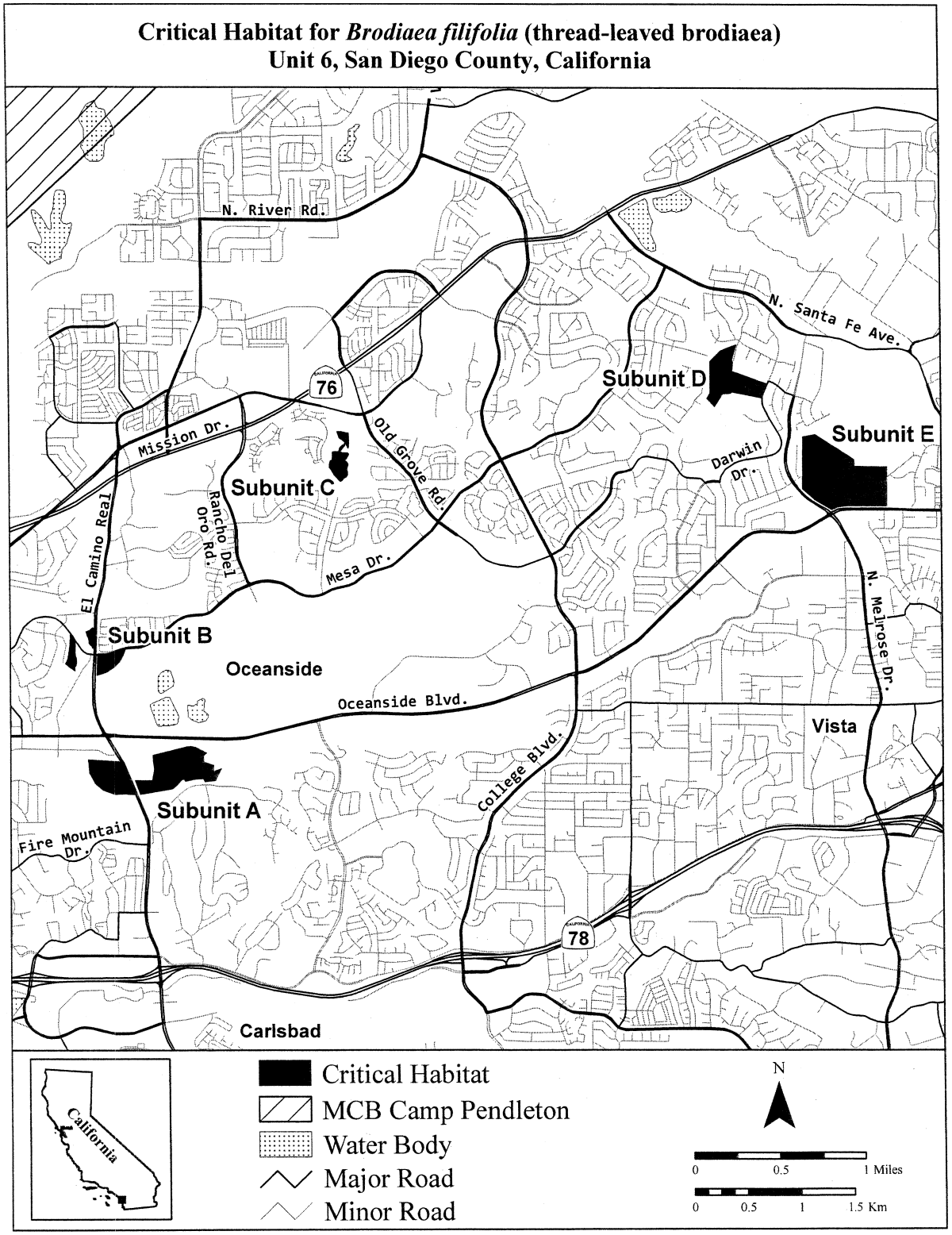
(ii) Subunit 6b, Mesa Drive. [*Description of unit location to be inserted here.*]

(iii) Subunit 6c, Mission View/Sierra Ridge. [*Description of unit location to be inserted here.*]

(iv) Subunit 6d, Taylor/Darwin. [*Description of unit location to be inserted here.*]

(v) Subunit 6e, Arbor Creek. [*Description of unit location to be inserted here.*]

(vi) *Note*: Map of Unit 6 follows:



(12) Unit 7: Carlsbad.

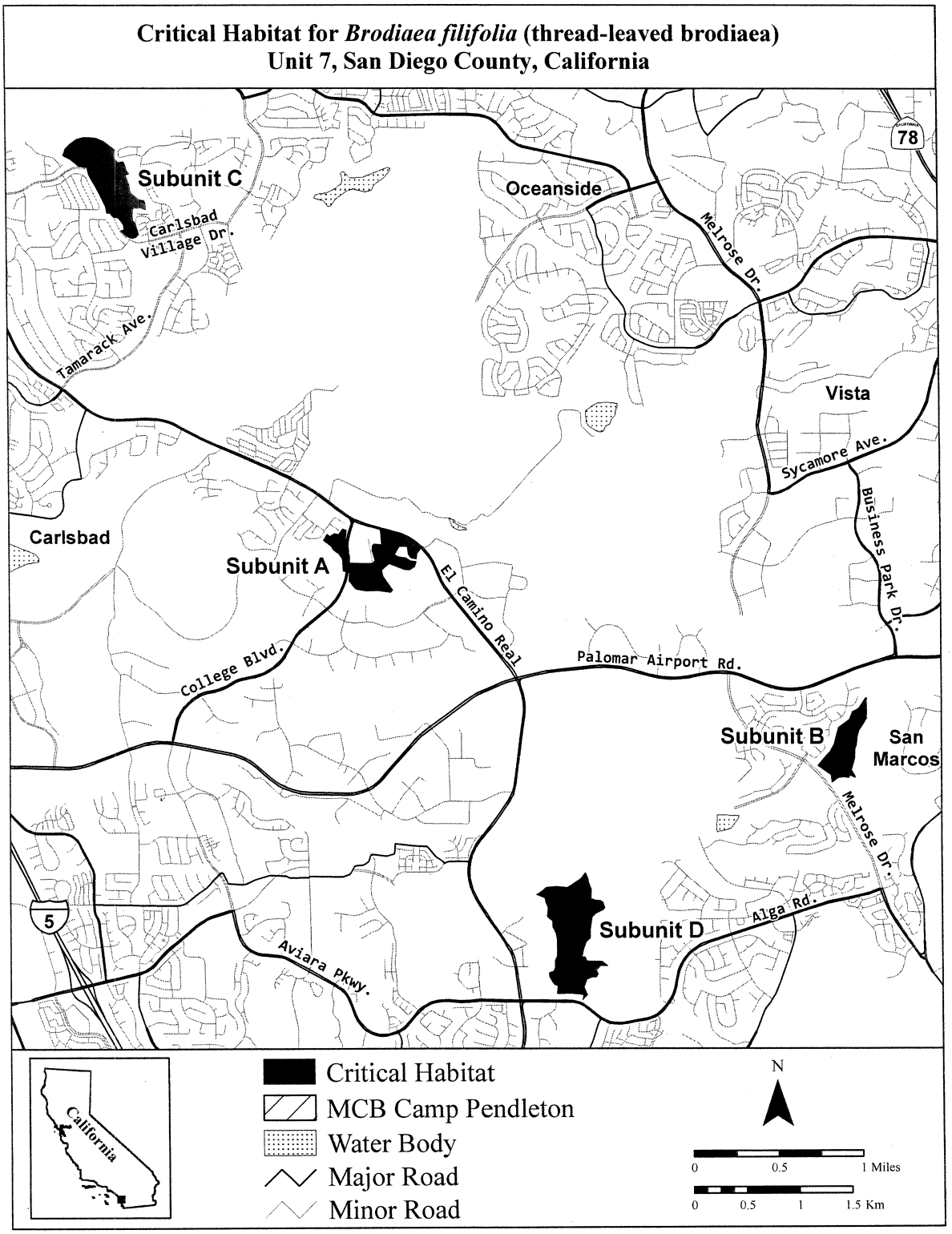
(i) Subunit 7a, Letterbox Canyon. [*Description of unit location to be inserted here.*]

(ii) Subunit 7b, Rancho Carrillo. [*Description of unit location to be inserted here.*]

(iii) Subunit 7c, Calavera Hills Village. [*Description of unit location to be inserted here.*]

(iv) Subunit 7d, Rancho La Costa. [*Description of unit location to be inserted here.*]

(v) *Note*: Map of Unit 7 follows:



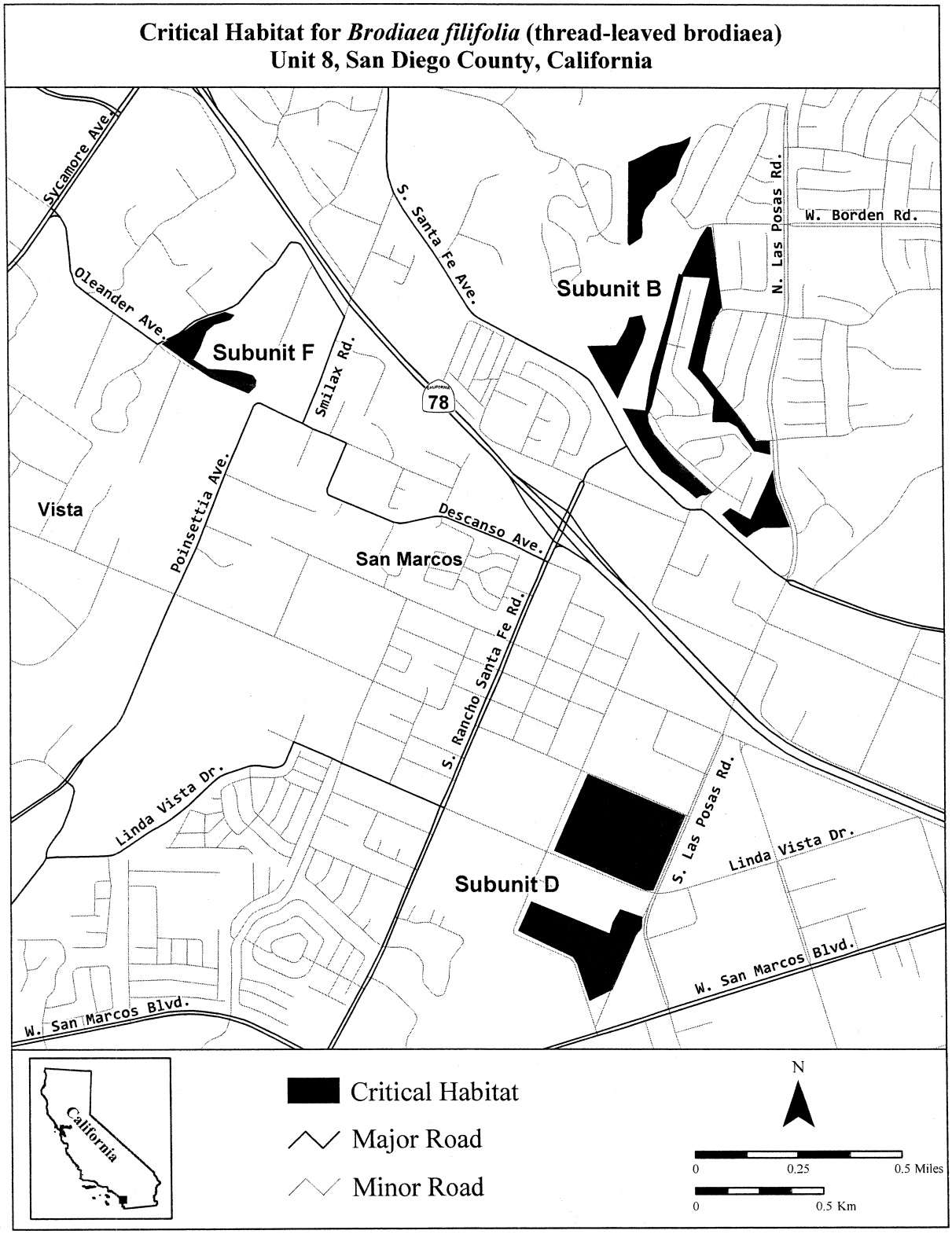
(13) Unit 8: San Marcos and Vista.

(i) Subunit 8b, Rancho Santalina/Loma Alta. [*Description of unit location to be inserted here.*]

(ii) Subunit 8d, Upham. [*Description of unit location to be inserted here.*]

(iii) Subunit 8f, Oleander/San Marcos. [*Description of unit location to be inserted here.*]

(iv) *Note*: Map of Unit 8 follows:



(14) Unit 11: Riverside County.

(i) Subunit 11a, San Jacinto Wildlife Area. [*Description of unit location to be inserted here.*]

(ii) Subunit 11b, San Jacinto Avenue/Dawson Road. [*Description of unit location to be inserted here.*]

(iii) Subunit 11c, Case Road. [*Description of unit location to be inserted here.*]

(iv) Subunit 11d, Railroad Canyon. [*Description of unit location to be inserted here.*]

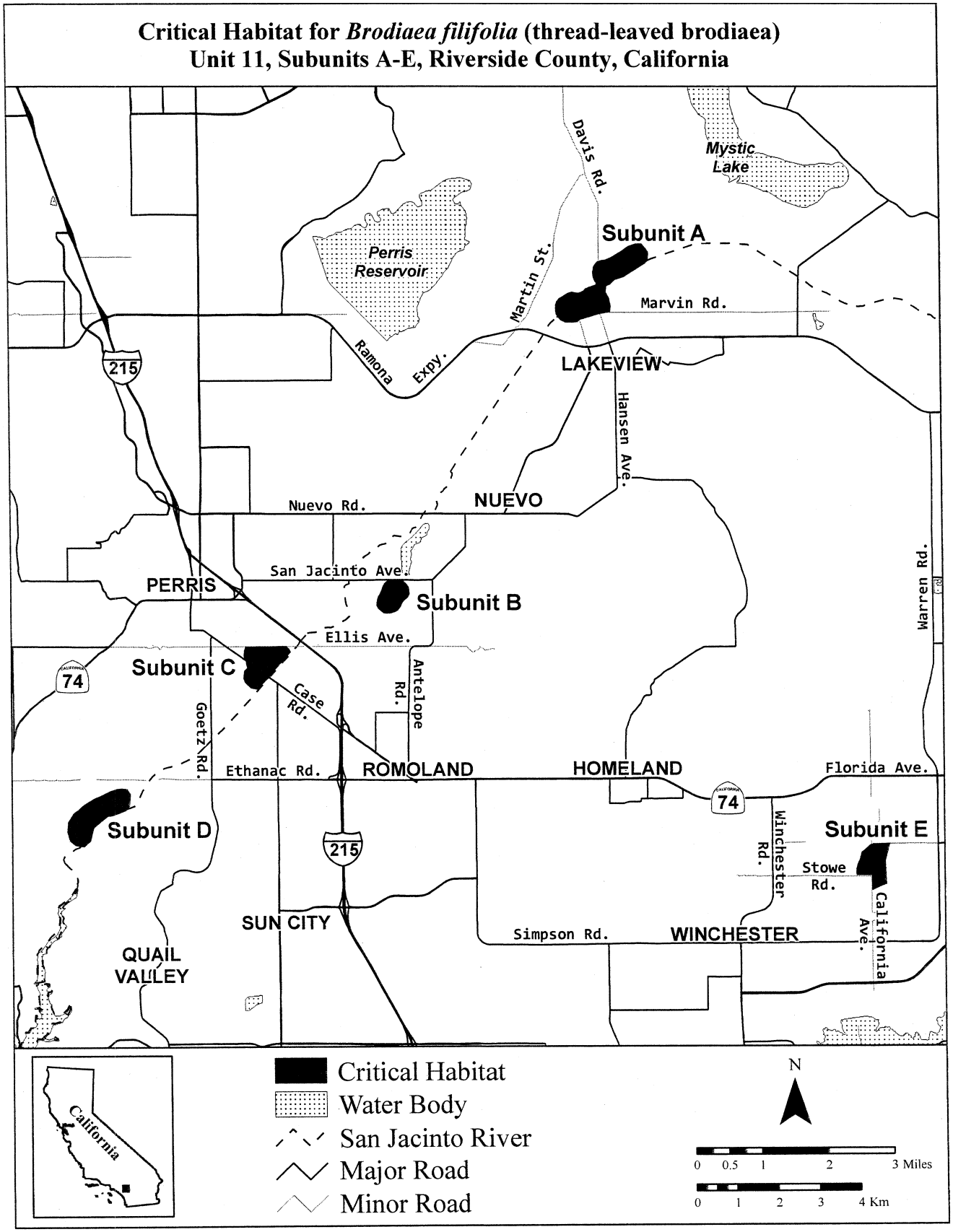
(v) Subunit 11e, Upper Salt Creek (Stowe Pool). [*Description of unit location to be inserted here.*]

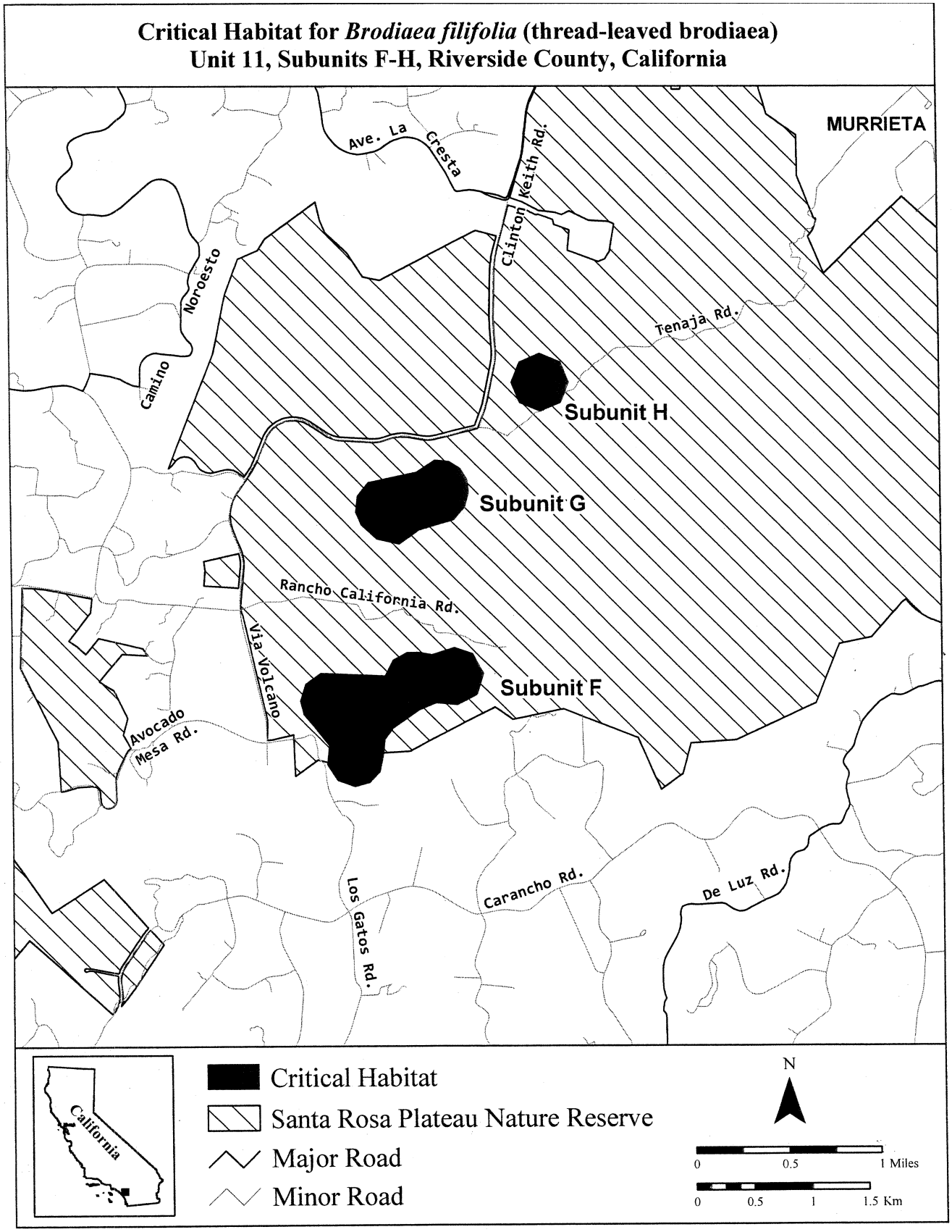
(vi) Subunit 11f, Santa Rosa Plateau—Mesa de Colorado. [*Description of unit location to be inserted here.*]

(vii) Subunit 11g, Santa Rosa Plateau—South of Tenaja Road. [*Description of unit location to be inserted here.*]

(viii) Subunit 11h, Santa Rosa Plateau—North of Tenaja Road. [*Description of unit location to be inserted here.*]

(ix) *Note*: Map of Unit 11 follows:

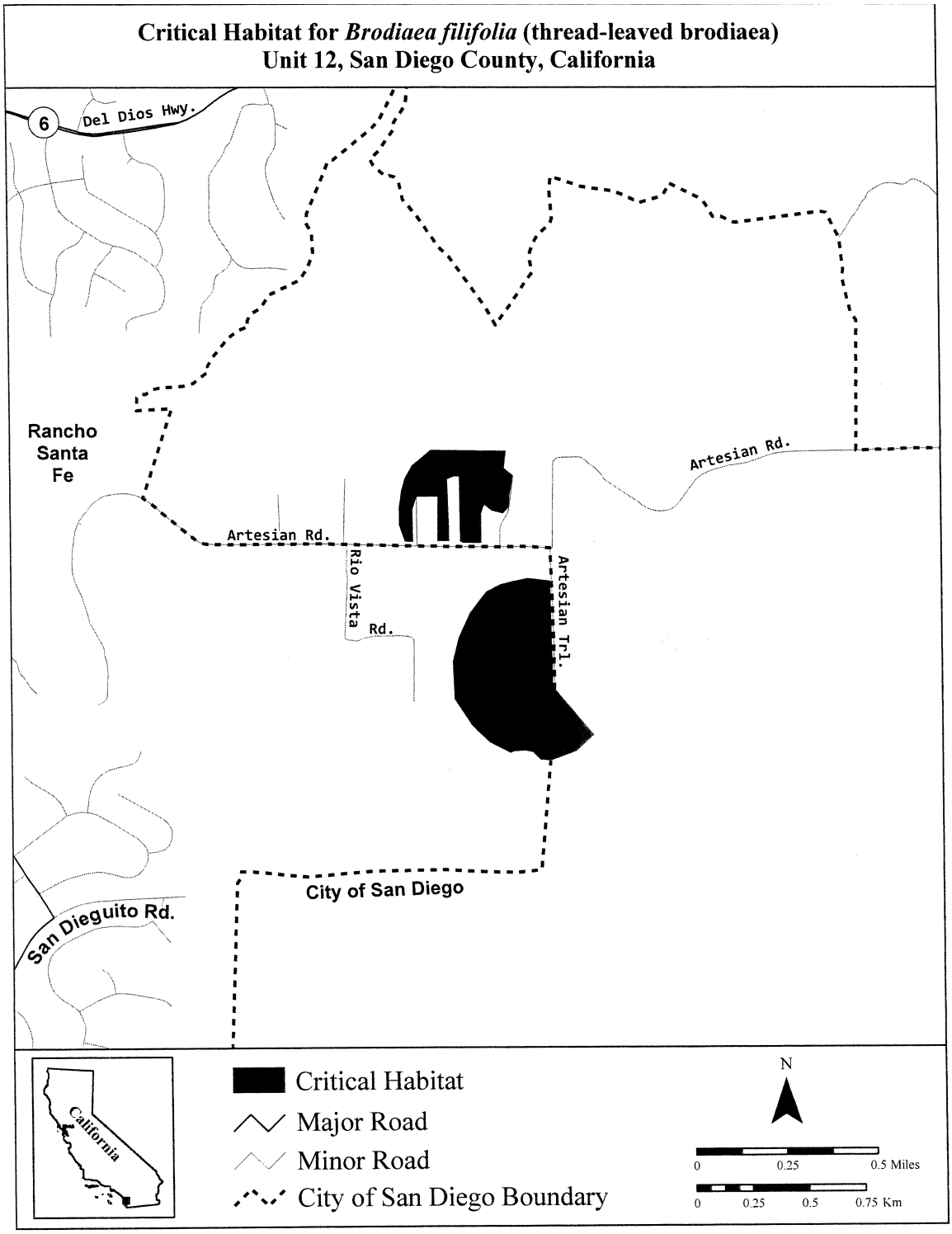

Critical Habitat for *Brodiaea filifolia* (thread-leaved brodiaea)
Unit 11, Subunits A-E, Riverside County, California
Davis Rd.
Mystic Lake
Subunit A
Perris Reservoir
Martin St.
Marvin Rd.
215
Ramona Expy.
LAKEVIEW
Hansen Ave.
Nuevo Rd.
NUEVO
San Jacinto Ave.
PERRIS
Subunit B
Warren Rd.
Ellis Ave.
74
Subunit C
Case Rd.
Antelope Rd.
Goetz Rd.
Ethanac Rd.
ROMOLAND
HOMELAND
Florida Ave.
74
Subunit D
215
Winchester Rd.
Subunit E
Stowe Rd.
California Ave.
SUN CITY
Simpson Rd.
WINCHESTER
QUAIL VALLEY
California
Critical Habitat
Water Body
San Jacinto River
Major Road
Minor Road
N
0 0.5 1 2 3 Miles
0 1 2 3 4 Km


Critical Habitat for *Brodiaea filifolia* (thread-leaved brodiaea)
Unit 11, Subunits F-H, Riverside County, California
MURRIETA
Ave. La Cresta
Clinton Keith Rd.
Noroesto
Camino
Tenaja Rd.
Subunit H
Subunit G
Rancho California Rd.
Via Volcano
Subunit F
Avocado Mesa Rd.
Los Gatos Rd.
Carancho Rd.
De Luz Rd.
California
Critical Habitat
Santa Rosa Plateau Nature Reserve
Major Road
Minor Road
N
0 0.5 1 Miles
0 0.5 1 1.5 Km

(15) Unit 12: San Diego County.

(i) [*Description of unit location to be inserted here.*]

(ii) *Note*: Map of Unit 12 follows:



* * * * *

Dated: November 21, 2009.

Thomas L. Strickland,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. E9–28869 Filed 12–7–09; 8:45 am]

BILLING CODE 4310–55–C

Federal Register

Tuesday,
December 8, 2009

Part V

Department of Transportation

Federal Transit Administration

Section 5309 Bus and Bus Facilities Livability Initiative Program Grants; Exempt Discretionary Program Grants (Section 5309) for Urban Circulator Systems; Notices

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

Section 5309 Bus and Bus Facilities Livability Initiative Program Grants

AGENCY: Federal Transit Administration (FTA), DOT. Discretionary Bus and Bus Facilities Program.

ACTION: Notice of Availability of FTA Bus and Bus Facilities Livability Initiative Program Funds: Solicitation of Project Proposals.

SUMMARY: The Federal Transit Administration (FTA) announces the availability of discretionary Section 5309 Bus and Bus Facilities grant funds in support of the Department of Transportation's Livability Initiative (''Livability Bus Program''). The Livability Bus program will be funded using $150 million in unallocated Discretionary Bus and Bus Facilities Program funds, authorized by 49 U.S.C. 5309(b) of the Safe, Accountable, Flexible, Efficient, Transportation Equity Act: A Legacy For Users (SAFETEA–LU), Public Law 109–59, August 10, 2005. FTA may use additional Bus and Bus Facilities funding that becomes available for discretionary allocation to further support this initiative.

The Livability Bus Program makes funds available to public transit providers to finance capital projects to replace, rehabilitate, and purchase buses and related equipment and to construct bus-related facilities, including programs of bus and bus-related projects for assistance to subrecipients that are public agencies, private companies engaged in public transportation, or private non-profit organizations. This notice includes priorities established by FTA for these discretionary funds, the criteria FTA will use to identify meritorious projects for funding, and describes how to apply.

This announcement is available on the FTA Web site at: *http://www.fta.dot.gov*. FTA will announce final selections on the Web site and in the **Federal Register**. A synopsis of this announcement will be posted in the FIND module of the government-wide electronic grants Web site at *http://www.grants.gov*. Proposals may be submitted to FTA electronically at *buslivability@dot.gov* or through the GRANTS.GOV APPLY function. Those who apply via e-mail at *buslivability@dot.gov* should receive a confirmation e-mail within two business days.

DATES: Complete proposals for the discretionary Bus Livability Program grants must be submitted by February 8, 2010. The proposals must be submitted electronically through the GRANTS.GOV Web site or via e-mail at *buslivability@dot.gov*. Anyone intending to apply electronically through GRANTS.GOV should initiate the process of registering on the GRANTS.GOV site immediately to ensure completion of registration before the deadline for submission.

ADDRESSES: Proposals may be submitted to FTA electronically at *buslivability@dot.gov* or through the GRANTS.GOV APPLY function. Those who apply via e-mail at *buslivability@dot.gov* should receive a confirmation e-mail within 2 business days.

FOR FURTHER INFORMATION CONTACT: Contact the appropriate FTA Regional Administrator (Appendix) for proposal-specific information and issues. For general program information, contact Kimberly Sledge, Office of Transit Programs, (202) 366–2053, e-mail: *kimberly.sledge@dot.gov* or Henrika Buchanan-Smith, (202)366–4020, e-mail: *henrika.buchanan-smith@dot.gov*. A TDD is available at 1–800–877–8339 (TDD/FIRS).

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Funding Opportunity Description

A. Authority

The program is authorized under 49 U.S.C. Section 5309(b) as amended by Section 3011 of SAFETEA–LU.

> ''The Secretary may make grants under this section to assist State and local governmental authorities in financing—* * *
>
> (3) capital projects to replace, rehabilitate, and purchase buses and related equipment and to construct bus-related facilities, including programs of bus and bus-related projects for assistance to subrecipients that are public agencies, private companies engaged in public transportation, or private non-profit organizations.''

B. Background

FTA has long fostered livable communities and sustainable development through its various transit programs and activities. Public transportation supports the development of communities, providing effective and reliable transportation alternatives that increase access to jobs, health and social services, entertainment, educational opportunities, and other activities of daily life, while also improving mobility within and among these communities. Through various initiatives and legislative changes over the last fifteen years, FTA has allowed and encouraged projects that help integrate transit into a community through neighborhood improvements and enhancements to transit facilities or services, or make improvements to areas adjacent to public transit facilities that may facilitate mobility demands of transit users or support other infrastructure investments that enhance the use of transit for the community.

On June 16, 2009, U.S. Department of Transportation (DOT) Secretary Ray LaHood, U.S. Department of Housing and Urban Development (HUD) Secretary Shaun Donovan, and U.S. Environmental Protection Agency (EPA) Administrator Lisa Jackson announced a new partnership to help American families in all communities—rural, suburban and urban—gain better access to affordable housing, more transportation options, and lower transportation costs.

DOT, HUD, and EPA created a high-level interagency partnership to better coordinate federal transportation, environmental protection, and housing investments. The Livability Bus Program funding will be awarded to projects that demonstrate these livability principles (see Section of this Preamble C.).

Approximately $150 million in unallocated Section 5309 Bus and Bus Facilities Program funds are available under this notice. By using these available funds, FTA and DOT can support tangible livability improvements within existing programs while demonstrating the feasibility and value of such improvements. These demonstrations can provide a sound basis for advancing greater investments in the future. In addition, the program builds on the momentum generated by the American Recovery and Reinvestment Act 2009 and can help inform Administration and Congressional decision makers on guidance needs for reauthorization.

C. Purpose

Improving mobility and shaping America's future by ensuring that the transportation system is accessible, integrated, and efficient, while offering flexibility of choices is a key strategic goal of the DOT. FTA is committed to creating livable communities that improve the quality of life for all

Americans. Public transportation provides transportation options that connects communities and fosters sustainability and the development of urban and rural land use. Through the Livability Bus Program grants, FTA will invest in projects that fulfill the six livability principles that serve as the foundation for the DOT-HUD-EPA Partnership for Sustainable Communities:

1. *Provide more transportation choices:* Develop safe, reliable, and economical transportation choices to decrease household transportation costs, reduce our nation's dependence on foreign oil, improve air quality, reduce greenhouse gas emissions and promote public health.

2. *Promote equitable, affordable housing:* Expand location- and energy-efficient housing choices for people of all ages, incomes, races and ethnicities to increase mobility and lower the combined cost of housing and transportation.

3. *Enhance economic competitiveness:* Improve economic competitiveness through reliable and timely access to employment centers, educational opportunities, services and other basic needs by workers as well as expanded business access to markets.

4. *Support existing communities:* Target federal funding toward existing communities—through such strategies as transit-oriented, mixed-use development and land recycling—to increase community revitalization, improve the efficiency of public works investments, and safeguard rural landscapes.

5. *Coordinate policies and leverage investment:* Align policies and funding to remove barriers to collaboration, leverage funding and increase the accountability and effectiveness of all levels of government to plan for future growth, including making smart energy choices such as locally generated renewable energy.

6. *Value communities and neighborhoods:* Enhance the unique characteristics of all communities by investing in healthy, safe and walkable neighborhoods—rural, urban or suburban.

FTA will evaluate proposals and assess a project's ability to advance local economic development goals, improve mobility for all citizens, create partnerships that result in the integration of transportation and land-use decision making and result in environmental benefits. Additionally, many rural areas are fighting to preserve their way of life by limiting urban sprawl and protecting valuable agricultural lands. Often these communities have seen jobs and businesses leave for larger communities and need assistance preserving and reinvigorating the traditional rural town center where locals can find the grocery, doctor, hardware store, family restaurant and town hall in easy walking distance from one another. FTA is committed to funding a mix of projects that include projects that demonstrate livability principles in rural areas including projects that provide access to jobs, medical services and other necessities in rural areas and that support the independence of the elderly and individuals with disabilities.

II. Award Information

Federal transit funds are available to State or Local governmental authorities as recipients and other public transportation providers as subrecipients at up to 80 percent of the project cost requiring a 20% local match. There is no floor or upper limit for any single grant under this program; however, FTA intends to fund as many meritorious projects as possible.

Consistent with 49 U.S.C. 5309(m)(8), the Secretary shall consider the age and condition of buses, bus fleets, related equipment, and bus-related facilities of applicants in its award of Livability Bus grants. And, in addition, FTA will consider geographical diversity in making final funding decisions.

Eligibility Information

A. Eligible Applicants

Eligible applicants under this program are Direct Recipients under the Section 5307 Urbanized Area Formula program, States, and Indian Tribes. Proposals for funding eligible projects in rural (nonurbanized) areas must be submitted as part of a consolidated State application with the exception of nonurbanized projects to Indian Tribes. Tribes, States, and Direct Recipients may also submit consolidated proposals for projects in urbanized areas.

Proposals may contain projects to be implemented by the Recipient or its subrecipients. Eligible subrecipients include public agencies, private non-profit organizations, and private providers engaged in public transportation.

B. Eligible Expenses

SAFETEA–LU grants authority to the Secretary to make grants to assist State and local governmental authorities in financing capital projects to replace, rehabilitate, and purchase buses and related equipment and to construct bus-related facilities, including programs of bus and bus-related projects for assistance to subrecipients that are public agencies, private companies engaged in public transportation, or private non-profit organizations.

Projects eligible for funding under the Livability Bus program are capital projects such as:

Purchase and rehabilitation of buses and vans, bus related equipment (including ITS, fare equipment, communication devices), construction and rehabilitation of bus-related facilities (including administrative, maintenance, transfer, and intermodal facilities, including facilities consistent with FTA's Joint Development policy which is available at *http://www.fta.dot.gov.*

Funds made available under this program may not be used to fund operating expenses, preventive maintenance, or any of the other expanded capital eligibility items (for example, security drills, debt service reserve, mobility management.) Funds also may not be used to reimburse projects that have incurred previous expenses absent evidence that FTA had issued a Letter of No Prejudice (LONP) for the project before the costs being incurred. There is no blanket pre-award authority for projects to be funded under this announcement before their identification in the **Federal Register** of selected projects.

C. Cost Sharing

Costs will be shared at the following ratio: 80 Percent FTA/20 Percent local contribution, unless the grantee requests a lower Federal share. FTA will not approve deferred local share under this program.

IV. Application and Submission Information

A. Proposal Submission Process

Project proposals must be submitted electronically through *http://www.grants.gov* or by e-mail electronically at *buslivability@dot.gov.* Submission via the bus livability e-mail is preferred. Mail and fax submissions will not be accepted except for supplemental information that cannot be sent electronically.

An applicant may propose a project that would take more than one year to complete, which includes expending a single year of Livability Bus program grant funds over multiple years. The project would, however, need to be ready to begin upon receiving a grant and need to be completed in a reasonable period of time, as evaluated on a case by case basis. In sum, the period of performance of the award is

separate from the year of funds of the award.

B. Application Content

1. Applicant Information

This provides basic sponsor identifying information, including: (a) Applicant name, and FTA recipient ID number, (b) Contact information for notification of project selection (including contact name, title, address, e-mail, fax and phone number, (c) description of services provided by the agency including areas served, (d) existing fleet and employee information, and (e) a description of the agency's technical, legal, and financial capacity to implement the proposed project. For applicants applying through GRANTS.GOV, some of this information is included in Standard Form 424.

2. Project Information

Every proposal must:

a. Describe the project to be funded and include with the proposal any applicable supporting documentation, such as: Information on the age of the current fleet, age of facility to be rehabilitated or replaced, the Metropolitan Planning Organization (MPO) concurrence letters, population forecasts, ridership information, etc.

b. Address each of the evaluation criteria separately, providing evidence that demonstrates how the project responds to each criterion.

c. Provide a line item budget for the project, with enough detail to describe the various key components of the project.

d. Provide the Federal amount requested.

e. Document the matching funds, including amount and source of the match, demonstrating strong local and private sector financial participation in the project. Provide support documentation including audited financial statements, bond-ratings, and documents supporting the commitment of non-federal funding to the project, or a timeframe upon which those commitments would be made.

f. Provide a project time-line, including significant milestones such as the date anticipated to issue a Request for Proposals for vehicles, or contract for purchase of vehicle(s), and actual or expected delivery date of vehicles, or notice of request for proposal and notice to proceed for capital construction/rehabilitation projects.

C. Submission Dates and Times

Complete proposals for the Bus Livability Program must be submitted to *buslivability@dot.gov* February 8, 2010 or submitted electronically through the GRANTS.GOV Web site by the same date. Applicants planning to apply through GRANTS.GOV are encouraged to begin the process of registration on the GRANTS.GOV site well in advance of the submission deadline. Registration is a multi-step process, which may take several weeks to complete before an application can be submitted. FTA will announce grant selections when the competitive selection process is complete.

D. Funding Restrictions

Only proposals from eligible recipients for eligible activities will be considered for funding (see Section III of this Preamble). Due to funding limitations, applicants that are selected for funding may receive less than the amount originally requested.

E. Other Submission Requirements

Applicants should submit 3 copies of any supplemental information that cannot be submitted electronically to the appropriate regional office. Supplemental information submitted in hardcopy must be postmarked by February 8, 2010.

V. Application Review, Selection, and Notification

A. Project Evaluation Criteria

Projects will be evaluated according to the following criteria. Each applicant is encouraged to demonstrate the responsiveness of a project to any and all of the selection criteria with the most relevant information that the applicant can provide, regardless of whether such information has been specifically requested, or identified, in this notice. FTA will assess the extent to which a project addresses the criteria below and produces a livability or sustainability outcome.

1. Demonstrated Need for Resources: FTA will evaluate each project to determine its need for resources. This determination will be made by examining the proposal to determine if:

a. The project represents a one-time or periodic need that cannot

reasonably be funded from FTA program formula allocations or

State and/or local revenues.

b. The project or applicant did not receive sufficient Federal funding

in previous years.

c. The project will have a significant impact on service delivery.

2. Planning and prioritization at local/regional level: FTA will examine each Bus Livability project proposal for consistency with the areas planning documents and local priorities. This examination will involve assessing whether:

a. The project is consistent with the transit priorities identified in the long range plan and/or contingency/illustrative projects.

b. The MPO endorses the project, if in a UZA, and the State, if for a rural area.

c. Local support is demonstrated by availability of local match for this and/or related projects and letters of support.

d. Capital projects are consistent with service needs of the area. Example: Vehicle expansion proposal shows evidence of the need for additional capacity.

e. If the project is multimodal in nature, the proposal demonstrates coordination with and support of other transportation modes and partners.

3. Livability: Livability investments are projects that deliver not only transportation benefits, but also are designed and planned in such a way that they have a positive impact on qualitative measures of community life. This element delivers benefits that are inherently difficult to measure. However, it is implicit to livability that its benefits are shared and therefore magnified by the number of potential users in the affected community. Therefore, descriptions of how projects enhance livability should include a description of the affected community and the scale of the project's impact. To determine whether a project improves the quality of the living and working environment of a community, FTA will qualitatively assess whether the project:

a. Will significantly enhance user mobility through the creation of more convenient transportation options for travelers;

b. The degree to which the proposed project contributes significantly to broader traveler mobility through intermodal connections, or improved connections between residential and commercial areas.

c. Will improve existing transportation choices by enhancing points of modal connectivity or, in urban areas, by reducing congestion on existing transit systems or roadways.

d. Will improve accessibility and transport services for economically disadvantaged populations, non-drivers, senior citizens, and persons with disabilities.

e. Is the result of a planning process which coordinated transportation and land-use planning decisions and encouraged community participation in the process.

4. Sustainability: In order to determine whether a project promotes a more environmentally sustainable transportation system, i.e., reducing

reliance on automobile travel, improving the pedestrian and walk environment of a community, use of environmental design techniques in the planning, construction, and operation of the project, FTA will assess the project's ability to:

a. Improve energy efficiency or reduce energy consumption/green house gas emissions; applicants are encouraged to provide information regarding the expected use of clean or alternative sources of energy; projects that demonstrate a projected decrease in the movement of people by less energy-efficient vehicles or systems will be given priority under this factor; and

b. Maintain, protect or enhance the environment, as evidenced by environmentally friendly policies and practices utilized in the project design, construction, and operation that exceed the requirements of the National Environmental Policy Act including items such as whether the project uses a Leadership in Energy and Environmental Design (LEED)-certified design, the vehicles or facilities are rated with the energy-star, the project re-uses a brownfield, construction equipment is retrofitted with catalytic converters, the project utilizes recycled materials, the project includes elements to conserve energy, such as passive solar heating, solar panels, wind turbines, reflective roofing or paving materials, or other advanced environmental design elements such as a green roof, etc.

5. Leveraging of public and private investments.

a. Jurisdictional and Stakeholder Collaboration: To measure a project's alignment with this criterion, FTA will assess the project's involvement of non-Federal entities and the use of non-Federal funds, including the scope of involvement and share of total funding. FTA will give priority to projects that receive financial commitments from, or otherwise involve, State and local governments, other public entities, or private or nonprofit entities, including projects that engage parties that are not traditionally involved in transportation projects, such as nonprofit community groups or the private owners of real property abutting the project. FTA will assess the amount of co-investment from State, local or other non-profit sources.

b. Disciplinary Integration: To demonstrate the value of partnerships across government agencies that serve the various public service missions and to promote collaboration on the objectives outlined in this notice, FTA will give priority to projects that are supported, financially or otherwise, by non-transportation public agencies that are pursuing similar objectives. For example, FTA will give priority to transportation projects that are supported by relevant public housing or human service agencies, or transportation projects that encourage energy efficiency or improve the environment and are supported by relevant public agencies with energy or environmental missions.

6. The project is ready to implement.

a. Any required environmental work has been initiated for construction projects requiring an Environmental Assessment (EA), Environmental Impact Statement (EIS), or documented Categorical Exclusion (CE).

b. Implementation plans are ready, including initial design of facilities projects.

c. TIP/STIP can be amended (evidenced by MPO/State endorsement).

d. Local share is in place.

e. Project can be obligated and implemented quickly if selected.

f. The applicant demonstrates the ability to carry out the proposed project successfully.

Note: Applicants must have basic technical, legal, and financial capacity as a precondition of grant award. Since proposals are limited to existing FTA grantees, applicants are assumed to have that basic capacity. This criterion refers to implementation of the particular project proposed.

a. For larger capital projects, the applicant has the technical capacity to administer the project.

b. For fleet replacement and/or expansion, the acquisition is consistent with the bus fleet management plan.

c. For fleet expansion, the applicant has the operating funds to support the expanded service.

d. There are no outstanding legal, technical or financial issues with the grantee that would bring the feasibility of successful project completion into question.

e. Source of 20% local match is identified and is available for prompt project implementation if selected (no deferred local share will be allowed).

f. The grantee is in fundable status for grant making purpose.

B. Review and Selection Process

Proposals will first be screened and ranked by the appropriate FTA regional office (see Appendix). Following this initial review, meritorious proposals will be submitted for a national review process and coordinated with representatives of HUD and EPA. Proposals will be screened and ranked based on the criteria in this notice by FTA headquarters staff in consultation with the appropriate FTA regional office (see Appendix), and coordinated with representatives of HUD and EPA. Highly qualified projects will be considered for inclusion in a national list of projects that addresses the identified priorities and represents the highest and best use of the available funding. As mentioned earlier in this Preamble, the Administrator will also take into consideration geographical diversity in his final decision. The FTA Administrator will determine the final selection and amount of funding for each project. Selected projects will be announced in early 2010. FTA will publish the list of all selected projects and funding levels in the Federal Register. Regional offices will also notify successful applicants of their success and the amount of funding awarded to the project.

VI. Award Administration

A. Award Notices

FTA will announce project selections in a **Federal Register** Notice and will post the **Federal Register** Notices on the Web. FTA regional offices will contact successful applicants. FTA will award grants for the selected projects to the applicant through the FTA electronic grants management and award system, TEAM, after receipt of a complete application in TEAM. These grants will be administered and managed by the FTA regional offices in accordance with the federal requirements of the Section 5309 bus program. At the time the project selections are announced, FTA will extend pre-award authority for the selected projects. There is no blanket pre-award authority for these projects prior to announcement.

B. Administrative and National Policy Requirements

1. Grant Requirements

If selected, applicants will apply for a grant through TEAM and adhere to the customary FTA grant requirements of the Section 5309 Bus and Bus Facilities program, including those of FTA C 9300.1A Circular and C 5010.1C and S. 5333(b) labor protections. Discretionary grants greater than $500,000 will go through Congressional Notification and release process. Technical assistance regarding these requirements is available from each FTA regional office.

2. Planning

Applicants are encouraged to notify the appropriate State Departments of Transportation and MPO in areas likely to be served by the project funds made available under this program. Incorporation of funded projects in the long range plans and transportation improvement programs of States and

metropolitan areas is required of all funded projects.

3. Standard Assurances

The Applicant assures that it will comply with all applicable Federal statutes, regulations, executive orders, FTA circulars, and other Federal administrative requirements in carrying out any project supported by the FTA grant. The Applicant acknowledges that it is under a continuing obligation to comply with the terms and conditions of the grant agreement issued for its project with FTA. The Applicant understands that Federal laws, regulations, policies, and administrative practices might be modified from time to time and affect the implementation of the project. The Applicant agrees that the most recent Federal requirements will apply to the project, unless FTA issues a written determination otherwise. The Applicant must submit the Certifications and Assurances before receiving a grant if it does not have current certifications on file.

C. Reporting

Post-award reporting requirements include submission of Financial Status Reports and Milestone reports in TEAM on a quarterly basis for all projects. Documentation is required for payment. In addition, grants which include innovative technologies may be required to report on the performance of these technologies.

VII. Agency Contacts

Contact the appropriate FTA Regional Administrator (see Appendix) for proposal-specific information and issues. For general program information, contact Henrika Buchanan-Smith or Kimberly Sledge, Office of Transit Programs, (202) 366–2053, e-mail: *henrika.buchanan-smith@dot.gov; kimberly.sledge@dot.gov.* A TDD is available at 1–800–877–8339 (TDD/FIRS).

Issued in Washington, DC, this 3rd day of December 2009.

Peter M. Rogoff,

Administrator.

APPENDIX A—FTA REGIONAL AND METROPOLITAN OFFICES

Richard H. Doyle Regional Administrator Region 1—Boston Kendall Square 55 Broadway, Suite 920 Cambridge, MA 02142–1093 Tel. 617 494–2055 States served: Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont.	Robert C. Patrick Regional Administrator Region 6—Ft. Worth 819 Taylor Street, Room 8A36 Ft. Worth, TX 76102 Tel. 817 978–0550 States served: Arkansas, Louisiana, Oklahoma, New Mexico and Texas.
Brigid Hynes-Cherin Regional Administrator Region 2—New York One Bowling Green, Room 429 New York, NY 10004–1415 Tel. No. 212 668–2170 States served: New Jersey, New York.	Mokhtee Ahmad Regional Administrator Region 7—Kansas City, MO 901 Locust Street, Room 404 Kansas City, MO 64106 Tel. 816 329–3920 States served: Iowa, Kansas, Missouri, and Nebraska.
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Yvette Taylor Regional Administrator Region 4—Atlanta 230 Peachtree Street, NW Suite 800 Atlanta, GA 30303 Tel. 404 562–3500 States served: Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, Puerto Rico, South Carolina, Tennessee, and Virgin Islands.	Leslie T. Rogers Regional Administrator Region 9—San Francisco 201 Mission Street, Suite 1650 San Francisco, CA 94105–1926 Tel. 415 744–3133 States served: American Samoa, Arizona, California, Guam, Hawaii, Nevada, and the Northern Mariana Islands.
Marisol Simon Regional Administrator Region 5—Chicago 200 West Adams Street, Suite 320 Chicago, IL 60606 Tel. 312 353–2789 States served: Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin.	Rick Krochalis Regional Administrator Region 10—Seattle Jackson Federal Building 915 Second Avenue, Suite 3142 Seattle, WA 98174–1002 Tel. 206 220–7954 States served: Alaska, Idaho, Oregon, and Washington.

APPENDIX A—FTA REGIONAL AND METROPOLITAN OFFICES—Continued

New York Metropolitan Office Region 2—New York One Bowling Green, Room 428 New York, NY 10004–1415 Tel. 212–668–2202	Chicago Metropolitan Office Region 5—Chicago 200 West Adams Street, Suite 320 Chicago, IL 60606 Tel. 312–353–2789
Philadelphia Metropolitan Office Region 3—Philadelphia 1760 Market Street, Suite 500 Philadelphia, PA 19103–4124 Tel. 215–656–7070	Los Angeles Metropolitan Office Region 9—Los Angeles 888 S. Figueroa Street, Suite 1850 Los Angeles, CA 90017–1850 Tel. 213–202–3952

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DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

Exempt Discretionary Program Grants (Section 5309) for Urban Circulator Systems

AGENCY: Federal Transit Administration (FTA), DOT.

ACTION: Notice of Availability of FTA Urban Circulator Funds; Solicitation of Project Proposals.

SUMMARY: The Federal Transit Administration (FTA) announces the availability of Section 5309 funds for exempt discretionary grants for Urban Circulator Systems which support the Department of Transportation Livability Initiative. The Urban Circulator program will be funded using $130 million in unallocated Discretionary New Starts/Small Starts Program funds, authorized by 49 U.S.C. 5309(a) of the Safe, Accountable, Flexible, Efficient, Transportation Equity Act: A Legacy For Users (SAFETEA–LU), Public Law 109–59, August 10, 2005. FTA may use additional Section 5309(a) Discretionary funding that becomes available for allocation to further support this initiative.

This notice invites proposals for urban circulator projects seeking less than $25,000,000 in Federal Section 5309 assistance that would compete for Section 5309 discretionary funds authorized by 49 U.S.C. 5309(a). The Secretary may make grants under 5309(a) to assist State and local governmental authorities in financing new fixed guideway capital projects including the acquisition of real property, the initial acquisition of rolling stock for the systems, the acquisition of rights-of-way, and relocation. This notice includes priorities established by FTA for these discretionary funds, the criteria FTA will use to identify meritorious projects for funding, and describes how to apply.

This announcement is available on the FTA Web site at: *http://www.fta.dot.gov.* FTA will announce final selections on the Web site and in the **Federal Register.** A synopsis of this announcement will be posted in the FIND module of the government-wide electronic grants Web site at *http://www.grants.gov*. Proposals may be submitted to FTA electronically at *UrbanCirculator@dot.gov* or through the GRANTS.GOV APPLY function. Those who apply via e-mail at *UrbanCirculator@dot.gov* should receive a confirmation e-mail within 2 business days.

DATES: Complete proposals for the discretionary program grants for urban circulator systems must be submitted by February 8, 2010. The proposals must be submitted electronically through the GRANTS.GOV Web site or via e-mail at *UrbanCirculator@dot.gov*. Anyone intending to apply electronically through GRANTS.GOV should initiate the process of registering on the GRANTS.GOV site immediately to ensure completion of registration before the deadline for submission.

ADDRESSES: Proposals may be submitted to FTA electronically at *UrbanCirculator@dot.gov* or through the GRANTS.GOV APPLY function. Those who apply via e-mail at *UrbanCirculator@dot.gov* should receive a confirmation e-mail within 2 business days.

FOR FURTHER INFORMATION CONTACT: Contact the appropriate FTA Regional Administrator (Appendix) for proposal-specific information and issues. For general program information, contact Elizabeth Day, (202) 366–5159, e-mail: *Elizabeth.Day@ dot.gov* in the FTA Office of Planning and Environment, Office of Project Planning. A TDD is available at 1–800–877–8339 (TDD/FIRS).

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Funding Opportunity Description

A. Authority

The program is authorized under 49 U.S.C. 5309(a) as amended by section 3011 of SAFETEA–LU. The Secretary may make grants under this section to assist State and local governmental authorities in financing new fixed guideway capital projects, including the acquisition of real property, the initial acquisition of rolling stock for the systems, the acquisition of rights-of-way, and relocation. Consistent with Section 5309(e)(1)(B), projects receiving less than $25,000,000 in Federal assistance with respect to a new fixed guideway capital project are considered exempt from certain requirements of the program, until a final regulation issued under paragraph (9) of this subsection takes effect.

B. Background

FTA has long fostered livable communities and sustainable transit development through its various programs and activities. Public transportation supports the development of communities, providing effective and reliable transportation alternatives that increase access to jobs, health and social services, entertainment, educational opportunities, and other activities of daily life, while also improving mobility within and among these communities. Through various initiatives and legislative changes over the last fifteen years, FTA has allowed and encouraged projects that help integrate transit into a community through neighborhood improvements and enhancements to transit facilities or services, or make improvements to areas adjacent to public transit facilities that may ease the transportation needs of transit users or support other infrastructure investments

that enhance the use of transit for the community.

On June 16, 2009, U.S. Department of Transportation (DOT) Secretary Ray LaHood, U.S. Department of Housing and Urban Development (HUD) Secretary Shaun Donovan, and U.S. Environmental Protection Agency (EPA) Administrator Lisa Jackson announced a new partnership to help American families in all communities—rural, suburban and urban—gain better access to affordable housing, more transportation options, and lower transportation costs.

DOT, HUD and EPA created a high-level interagency partnership to better coordinate Federal transportation, environmental protection, and housing investments. The Urban Circulator Program funding will be awarded to eligible projects that best demonstrate these livability principles (see C. below).

Approximately $130 million in unallocated Section 5309 New Starts/Small Starts funds are available under this notice. By using these available funds, FTA and DOT can support tangible livability improvements within existing programs while demonstrating the feasibility and value of such improvements. These demonstrations can provide a sound basis for advancing greater investments in the future. In addition, the program builds on the momentum generated by the American Recovery and Reinvestment Act 2009 and can help inform Administration and Congressional decisions makers on guidance needs for reauthorization.

C. Purpose

Improving mobility and shaping America's future by ensuring that the transportation system is accessible, integrated, and efficient, and offers flexibility of choices is a key strategic goal of DOT. FTA is committed to creating livable communities that improve the quality of life for all Americans. Urban circulator systems such as streetcars provide a transportation option that connects urban destinations and fosters the redevelopment of urban spaces into walkable mixed use, high density environments. Through the Urban Circulator Program grants, FTA will invest in a limited number of projects that fulfill the six livability principles that serve as the foundation for the DOT–HUD–EPA Partnership for Sustainable Communities:

1. *Provide more transportation choices:* Develop safe, reliable and economical transportation choices to decrease household transportation costs, reduce our nation's dependence on foreign oil, improve air quality, reduce greenhouse gas emissions and promote public health.

2. *Promote equitable, affordable housing:* Expand location- and energy-efficient housing choices for people of all ages, incomes, races and ethnicities to increase mobility and lower the combined cost of housing and transportation.

3. *Enhance economic competitiveness:* Improve economic competitiveness through reliable and timely access to employment centers, educational opportunities, services and other basic needs by workers as well as expanded business access to markets.

4. *Support existing communities:* Target Federal funding toward existing communities—through such strategies as transit-oriented, mixed-use development and land recycling—to increase community revitalization, improve the efficiency of public works investments, and safeguard rural landscapes.

5. *Coordinate policies and leverage investment:* Align Federal policies and funding to remove barriers to collaboration, leverage funding and increase the accountability and effectiveness of all levels of government to plan for future growth, including making smart energy choices such as locally generated renewable energy.

6. *Value communities and neighborhoods:* Enhance the unique characteristics of all communities by investing in healthy, safe and walkable neighborhoods—rural, urban or suburban.

FTA will evaluate proposals and assess a project's ability to advance local economic development goals, improve accessibility, create partnerships that result in the integration of transportation and land-use decision making and result in environmental benefits.

II. Award Information

Federal transit funds are available to State or local governmental authorities as recipients and other public transportation providers as subrecipients for up to 80% of the net project capital cost, not to exceed $24.99 million in Section 5309 funds. Rail transit projects selected under the program would be subject to State Safety Oversight, consistent with 49 CFR part 659.

III. Eligibility Information

A. Eligible Applicants

Eligible applications under this program are public bodies and agencies (transit authorities and other State and local public bodies and agencies thereof) including States, municipalities, other political subdivisions of States; public agencies and instrumentalities of one or more States; and certain public corporations, boards, and commissions established under State law, who are authorized to engage in public transportation.

B. Eligible Projects

To be eligible for funding under Section 5309(a), a project must be based on the results of an alternative analysis and preliminary engineering. In addition, a project must meet one of the following guideway criteria:

1. Be a fixed guideway for at least 50% of the project length in the peak period—AND/OR—

2. Be a corridor-based bus project with the following minimum elements:

a. Substantial Transit Stations
b. Signal Priority/Pre-emption (for Bus/LRT)
c. Low Floor/Level Boarding Vehicles
d. Special Branding of Service
e. Frequent Service—10 min peak/15 min off peak
f. Service offered at least 14 hours per day

C. Eligible Expenses

Section 5309 grants authority to the Secretary to make grants ''to assist State and local governmental authorities in financing new fixed guideway capital projects, including the acquisition of real property, the initial acquisition of rolling stock for the systems, the acquisition of rights-of-way, and relocation.'' Section 5309 also allows the Secretary to make grants ''for fixed guideway corridor development for projects in the advanced stages of alternatives analysis or preliminary engineering.'' Due to the limited amount of funds, FTA is limiting awards under this program to the activities mentioned in the first sentence and not the second. Section 5309 funds cannot be used to reimburse grantees that have incurred prior expenses for the project absent evidence that FTA had issued a Letter of No Prejudice (LONP) for the project prior to the costs being incurred. There is no blanket pre-award authority for projects to be funded under this announcement prior to the identification in the Federal Register of selected projects.

D. Cost Sharing

FTA will provide up to 80% of the net project capital cost; however the amount of Section 5309(a) funds must be less than $25 million for each urban circulator project selected. Other Federal funds that are eligible to be

expended for transportation capital projects can be applied to the project. FTA will not approve deferred local share under this program.

IV. Application and Submission Information

A. Proposal Submission Process

Proposals may also be submitted to FTA electronically at *UrbanCirculator@dot.gov* or through the GRANTS.GOV APPLY function. The Office of Management and Budget (OMB) requires all Federal agencies to make applications for competitive grant programs available through GRANTS.GOV. A synopsis of this announcement will be posted in the FIND module of the government-wide electronic grants Web site at *http://www.grants.gov* and applicants will be able to apply through the APPLY module of that site. Those who apply via e-mail at *UrbanCirculator@dot.gov* should receive a confirmation e-mail within 2 business days.

B. Application Content

1. Applicant Information

This addresses basic identifying information, including: (i) Applicant name and FTA recipient ID number; (ii) contact information (including contact name, title, address, e-mail, fax and phone number); (iii) description of services provided by the agency, including areas served; and (iv) a description of the agency's technical, legal and financial capacity to implement the proposed project. For applicants applying through GRANTS.GOV, some of this information is included in the Standard Form 424.

2. Project Information

Every proposal must:

a. Describe the scope of the project for which funding is requested and provide a detailed operating plan for the urban circulator for which assistance is being sought, including the length of the project, number of vehicles, number of stations/stops, frequency of service, hours of operation, location of maintenance facilities, park and ride lots, and intermodal connections and transfer centers and a brief discussion of the problem the project seeks to solve.

b. Provide a preliminary management plan and a feasible and sufficiently detailed project schedule.

c. Address each of the evaluation criteria separately, providing evidence that demonstrates how the project responds to each criterion, for example, coordinated land use plans, economic development incentives, existing and projected transit ridership that will result from the project and status of environmental compliance activities.

d. Provide a line item budget for the project, including the Federal amount requested from FTA and the total cost for each purpose for which funds are sought, and the total Federal amount requested from FTA and total project cost. Other Federal funds can be applied to the project.

e. Document the matching funds, including amount and source of the match, demonstrating strong local and private sector financial participation in the project. Provide support documentation including audited financial statements, bond-ratings, and documents demonstrating the commitment of non-Federal funding to the project, or a timeframe upon which those commitments would be made.

f. The Proposal may include additional supplemental information, for example, architectural drawings, letters of support, maps.

C. Submission Dates and Times

Complete proposals for the Urban Circulator Program may be submitted electronically through the GRANTS.GOV Web site or by e-mail electronically at *UrbanCirculators@dot.gov* February 8, 2010. Submission by one of the electronic methods above is required. Mail and fax submissions will not be accepted except for supplemental information that cannot be sent electronically. The total application may not exceed 25 pages. In addition, a synopsis of this announcement will also be posted in the FIND module of the government-wide electronic grants Web site at *http://www.grants.gov* and applicants will be able to apply through the APPLY module of that site.

D. Funding Restrictions

Only proposals from eligible recipients for eligible activities will be considered for funding (see Section III). Due to funding limitations, applicants that are selected for funding may receive less than the amount requested.

E. Other Submission Requirements

Applicants should submit 3 copies of any supplemental information that cannot be submitted electronically to the appropriate FTA regional office. Supplemental information submitted in hardcopy must be postmarked or delivered by alternate delivery services by February 8, 2010.

V. Application Review Information

A. Project Evaluation Criteria

Projects will be evaluated according to the following criteria. Applicants are encouraged to demonstrate the responsiveness of a project to any and all of the selection criteria with the most relevant information that applicants can provide, regardless of whether such information has been specifically requested, or identified, in this notice. FTA will assess the extent to which a project produces one or more of the following outcomes.

(1.) *Livability:* Livability investments are projects that not only deliver transportation benefits, but are also designed and planned in such a way that they have a positive impact on qualitative measures of community life. This element delivers benefits that are inherently difficult to measure. However, it is implicit to livability that its benefits are shared and therefore magnified by the number of potential users in the affected community. Therefore, descriptions of how projects enhance livability should include a description of the affected community and the scale of the project's impact, including existing transit ridership and projected transit ridership that will result from the project. In order to determine whether a project improves the quality of the living and working environment of a community, FTA will qualitatively assess whether the project:

(a) Will significantly enhance accessibility through the creation of more convenient transportation options for travelers;

(b) Will improve existing transportation choices by enhancing points of modal connectivity;

(c) Will improve accessibility and transport services for economically disadvantaged populations, non-drivers, senior citizens, and persons with disabilities;

(d) Is the result of a planning process which coordinated transportation and land-use planning decisions and encouraged community participation in the process.

FTA will also assess whether there is existing or planned mixed income housing, including low income housing, within walking distance of the project. In addition, particular attention will be paid to the degree to which the proposed project contributes significantly to broader traveler accessibility through intermodal connections or improved connections between residential and commercial areas. Consequently the application should clearly identify how the project will connect redeveloping or new neighborhoods on vacant or underutilized land to each other or to major attractors in the central city or how circulator or connector lines under the project will connect developed

neighborhoods with one another or with the business district in the central city. Applications should also note proposed strategies to deliver high quality pedestrian environments in the corridor.

(2) *Sustainability:* In order to determine whether a project promotes a more environmentally sustainable transportation system, *i.e.,* reducing reliance on automobile travel, improving the pedestrian and walk environment of a community and using environmental design techniques in the planning, construction, and operation of the project, FTA will assess the project's ability to:

(a) Improve energy efficiency or reduce energy consumption/green house gas emissions; applicants are encouraged to provide information regarding the expected use of clean or alternative sources of energy; projects which introduce new technology through innovative and improved products such as those which involve energy saving propulsion technologies within the eligible major capital investment criteria or that demonstrate a projected decrease in the movement of people by less energy-efficient vehicles or systems will be given priority under this factor; and

(b) Maintain, protect or enhance the environment, as evidenced by environmentally friendly policies and practices utilized in the project design, construction, and operation that exceed the requirements of the National Environmental Policy Act including items such as whether the project uses a Leadership in Energy and Environmental Design (LEED)-certified design, the vehicles or facilities are rated with the energy-star, the project uses a brownfield, construction equipment is retrofitted with catalytic converters, the project utilizes recycled materials, the project includes elements to conserve energy, such as passive solar heating, solar panels, wind turbines, reflective roofing or paving materials, or other advanced environmental design elements such as a green roof, *etc.*

(3) *Economic Development:* FTA will assess whether the project will foster redevelopment adjacent to the project for which assistance is being sought. In addition, FTA will assess whether existing plans, policies, and incentives promote economic development and transit supportive development that provides jobs and services within the community, and whether there is demonstrated progress towards achieving mixed use development, at those locations specifically served by the proposed project.

(4) *Leveraging of public and private investments.*

(a) Jurisdictional & Stakeholder Collaboration: To measure a project's alignment with this criterion, FTA will assess the project's involvement of non-Federal entities and the use of non-Federal funds, including the scope of involvement and share of total funding. FTA will give priority to projects that receive financial commitments from, or otherwise involve, State and local governments, other public entities, or private or nonprofit entities, including projects that engage parties that are not traditionally involved in transportation projects, such as nonprofit community groups or the private owners of real property abutting the project. FTA will assess the amount of private debt and equity to be invested in the project or the amount of co-investment from State, local or other non-profit sources.

(b) Disciplinary Integration: Livability incorporates the concept of collaborative decision-making. To promote collaboration on the objectives outlined in this notice and to demonstrate the value of partnerships across government agencies that serve the various public service missions FTA will give priority to projects that are supported, financially or otherwise, by non-transportation public agencies that are pursuing similar objectives and are aligning their community development activities to increase the efficiency of Federal investments. FTA will give priority to transportation projects that are supported by relevant public housing agencies, or transportation projects that encourage energy efficiency or improve the environment and are supported by relevant public agencies with energy or environmental missions.

(5) *The applicant must demonstrate the ability to carry out the proposed project successfully.* Applicants must have basic technical, legal, and financial capacity as a precondition of grant award as evidenced by:

(a) Project Schedule: A feasible and sufficiently detailed project schedule demonstrating that the project can begin construction within eighteen months of receipt of a Discretionary Grant and that the Grant Funds will be spent steadily and expeditiously once construction starts.

(b) Environmental Approvals: Receipt (or reasonably anticipated receipt) of all environmental approvals necessary for the project to proceed to construction on the timeline specified in the project schedule, including satisfaction of all Federal, State and local requirements and completion of the National Environmental Policy Act process. Applicants must consult with their FTA regional office to determine the feasibility of a reasonably anticipated receipt of an environmental decision on the proposed project.

(c) Legislative Approvals: Receipt of all necessary legislative approvals. The project application must demonstrate: (1) That development or redevelopment agreements are in place with respect to the project; (2) land use policies complementary to the project have been adopted for land in close proximity to the project; and (3) property zoned to accommodate mixed-use development is available adjacent to the project.

(d) State and Local Planning: The inclusion of the project in the relevant State, metropolitan, and local planning documents. All regionally significant projects requiring an action by FTA must be in the metropolitan transportation plan, Transportation Improvement Program (TIP) and Statewide Transportation Improvement Program (STIP). To the extent a project is required to be in a metropolitan transportation plan, TIP and/or STIP it will not receive an Urban Circulator Discretionary Grant until it is included in such plans.

(e) Technical Feasibility: The technical feasibility of the project, including completion of sufficient engineering and design.

(f) Financial Feasibility: The viability and completeness of the project's financing package, including evidence of stable and reliable financial commitments and contingency reserves, as appropriate, and evidence of the grant recipient's ability to manage grants.

B. Review and Selection Process

Proposals will be screened and ranked based on the criteria in this notice by FTA headquarters staff in consultation with the appropriate FTA regional office (see Appendix), and coordinated with representatives of HUD and EPA. Highly qualified projects will be considered for inclusion in a national list of projects that addresses the identified priorities and represents the highest and best use of the available funding. The FTA Administrator will determine the final selection and amount of funding for each project. Selected projects will be announced in early 2010. FTA will publish the list of all selected projects and funding levels in the **Federal Register**.

VI. Award Administration

A. Award Notices

FTA will announce project selections in a **Federal Register** Notice and FTA regional offices will contact successful applicants. FTA will award grants for

the selected projects to the applicant through the FTA electronic grants management and award system, TEAM, after receipt of a complete application in TEAM. These grants will be administered and managed by the FTA regional offices in accordance with the Federal requirements of the Section 5309 bus program. At the time the project selections are announced, FTA will extend pre-award authority for the selected projects. There is no blanket pre-award authority for these projects prior to announcement.

B. Administrative and National Policy Requirements

1. Grant Requirements

If selected, applicants will apply for a grant through TEAM and adhere to the customary FTA grant requirements of the Section 5309 Major Capital Investment program, including those of FTA C 9300.1A; C 5010.1C; and labor protections required under 49 U.S.C. 5333(b). Discretionary grants greater than $500,000 will go through Congressional Notification and release process. Technical assistance regarding these requirements is available from each FTA regional office.

2. Planning

Applicants are encouraged to notify the appropriate State DOT and Metropolitan Planning Organizations (MPOs) in areas likely to be served by the project funds made available under this program. Before grant award, the project must satisfy requirements for inclusion in the STIP and Metropolitan TIP, where applicable.

3. Standard Assurances

FTA annually issues a set of standard Certifications and Assurances which each FTA grantee must sign, assuring that it will comply with all applicable Federal statutes, regulations, executive orders, FTA circulars, and other Federal administrative requirements in carrying out any project supported by the FTA grant. The Applicant acknowledges that it is under a continuing obligation to comply with the terms and conditions of the grant agreement issued for its project with FTA. The Applicant understands that Federal laws, regulations, policies, and administrative practices might be modified from time to time and affect the implementation of the project. The Applicant agrees that the most recent Federal requirements will apply to the project, unless FTA issues a written determination otherwise. The Applicant must submit all relevant current Certifications and Assurances prior to receiving a grant under this announcement.

C. Reporting

Post-award reporting requirements include submission of Financial Status Reports, Milestone reports, and narrative progress reports in TEAM on a quarterly basis. Documentation is required for payment. Recipients of exempt discretionary grants for urban circulators shall submit information that describes the impact of the urban circulator on transit ridership and economic development after two years of operation. In addition, grants which include innovative technologies may be required to report on the performance of these technologies.

VII. Agency Contacts

Contact the appropriate FTA Regional Administrator (see Appendix) for proposal-specific information and issues. For general program information, contact Elizabeth Day, (202) 366–5159, e-mail: *Elizabeth.Day@dot.gov* in the FTA Office of Planning and Environment, Office of Project Planning. A TDD is available at 1–800–877–8339 (TDD/FIRS).

Issued in Washington, DC, this 3rd day of December 2009.

Peter M. Rogoff,

Administrator.

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APPENDIX A—FTA REGIONAL AND METROPOLITAN OFFICES—Continued

States served: Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, Puerto Rico, South Carolina, Tennessee, and Virgin Islands.	States served: American Samoa, Arizona, California, Guam, Hawaii, Nevada, and the Northern Mariana Islands.
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FEDERAL REGISTER PAGES AND DATE, DECEMBER

CFR PARTS AFFECTED DURING DECEMBER

At the end of each month, the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

27 CFR

9.....64602

29 CFR

1601.....63981
1602.....63981
1603.....63981
1607.....63981
1610.....63981
1611.....63981
1614.....63981
1625.....63981
1690.....63981
2200.....63985
2203.....63985
2204.....63985
4022.....62697
4044.....62697

Proposed Rules:

403.....63335
408.....63335
1202.....63695
1206.....63695
1910.....64027

30 CFR

944.....63988

31 CFR

30.....63990, 63991
132.....62687

32 CFR

323.....62699

33 CFR

100.....62699
117 .....62700, 63610, 63612, 64613
165 .....62700, 62703, 64613

Proposed Rules:

117.....63695, 64641

37 CFR

381.....62705

38 CFR

9.....62706
17.....63307

40 CFR

52 .....63066, 63309, 63993, 63995
63 .....63236, 63504, 63613
81.....63995
141.....63069
180.....63070, 63074
300.....63616, 64615
450.....62996

Proposed Rules:

50.....64810
52 .....62717, 63080, 63697
53.....64810
58.....64810
63.....63701
261.....64643
300.....64658

46 CFR

2.....63617
24.....63617
30.....63617
70.....63617
90.....63617
114.....63617
175.....63617
188.....63617

47 CFR

15.....63079
73.....62706

Proposed Rules:

0.....63702
1.....63702
61.....63702
69.....63702
73.....62733, 63336

48 CFR

802.....64619
804.....64619
808.....64619
809.....64619
810.....64619
813.....64619
815.....64619
817.....64619
819.....64619
828.....64619
852.....64619

Proposed Rules:

552.....63704
570.....63704

49 CFR

192.....63310, 63906
195.....63310
571.....63182
585.....63182

50 CFR

21.....64638
300.....63999
622.....63673
648.....62706, 64011

Proposed Rules:

17 .....63037, 63343, 63366, 64930
226.....63080
600.....64042
635.....63095
679.....63100

LIST OF PUBLIC LAWS

This is a continuing list of public bills from the current session of Congress which have become Federal laws. It may be used in conjunction with ''PLUS'' (Public Laws Update Service) on 202–741–6043. This list is also available online at *http://www.archives.gov/federal-register/laws.html*.

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H.R. 955/P.L. 111–99

To designate the facility of the United States Postal Service located at 10355 Northeast Valley Road in Rollingbay, Washington, as the ''John 'Bud' Hawk Post Office''. (Nov. 30, 2009; 123 Stat. 3011)

H.R. 1516/P.L. 111–100

To designate the facility of the United States Postal Service located at 37926 Church Street in Dade City, Florida, as the ''Sergeant Marcus Mathes Post Office''. (Nov. 30, 2009; 123 Stat. 3012)

H.R. 1713/P.L. 111–101

To name the South Central Agricultural Research Laboratory of the Department of Agriculture in Lane, Oklahoma, and the facility of the United States Postal Service located at 310 North Perry Street in Bennington, Oklahoma, in honor of former Congressman Wesley ''Wes'' Watkins. (Nov. 30, 2009; 123 Stat. 3013)

H.R. 2004/P.L. 111–102

To designate the facility of the United States Postal Service located at 4282 Beach Street in Akron, Michigan, as the ''Akron Veterans Memorial Post Office''. (Nov. 30, 2009; 123 Stat. 3014)

H.R. 2215/P.L. 111–103

To designate the facility of the United States Postal Service located at 140 Merriman Road in Garden City, Michigan, as the ''John J. Shivnen Post Office Building''. (Nov. 30, 2009; 123 Stat. 3015)

H.R. 2760/P.L. 111–104

To designate the facility of the United States Postal Service located at 1615 North Wilcox Avenue in Los Angeles, California, as the ''Johnny Grant Hollywood Post Office Building''. (Nov. 30, 2009; 123 Stat. 3016)

H.R. 2972/P.L. 111–105

To designate the facility of the United States Postal Service located at 115 West Edward Street in Erath, Louisiana, as the ''Conrad DeRouen, Jr. Post Office''. (Nov. 30, 2009; 123 Stat. 3017)

H.R. 3119/P.L. 111–106

To designate the facility of the United States Postal Service located at 867 Stockton Street in San Francisco, California, as the ''Lim Poon Lee Post Office''. (Nov. 30, 2009; 123 Stat. 3018)

H.R. 3386/P.L. 111–107

To designate the facility of the United States Postal Service located at 1165 2nd Avenue in Des Moines, Iowa, as the ''Iraq and Afghanistan Veterans Memorial Post Office''. (Nov. 30, 2009; 123 Stat. 3019)

H.R. 3547/P.L. 111–108

To designate the facility of the United States Postal Service located at 936 South 250 East in Provo, Utah, as the ''Rex E. Lee Post Office Building''. (Nov. 30, 2009; 123 Stat. 3020)

S. 748/P.L. 111–109

To redesignate the facility of the United States Postal Service located at 2777 Logan Avenue in San Diego, California, as the ''Cesar E. Chavez Post Office''. (Nov. 30, 2009; 123 Stat. 3021)

S. 1211/P.L. 111–110

To designate the facility of the United States Postal Service located at 60 School Street, Orchard Park, New York, as the ''Jack F. Kemp Post Office Building''. (Nov. 30, 2009; 123 Stat. 3022)

S. 1314/P.L. 111–111

To designate the facility of the United States Postal Service located at 630 Northeast Killingsworth Avenue in Portland, Oregon, as the ''Dr. Martin Luther King, Jr. Post Office''. (Nov. 30, 2009; 123 Stat. 3023)

S. 1825/P.L. 111–112

To extend the authority for relocation expenses test programs for Federal employees, and for other purposes. (Nov. 30, 2009; 123 Stat. 3024)

Last List November 16, 2009

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